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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh *CM*
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Administrative Review
of the Antidumping Duty Order on Small Diameter Graphite
Electrodes from the People's Republic of China; 2014-2015

Summary

We analyzed the case and rebuttal briefs submitted by 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 (the PRC) covering the period February 1, 2014, through January 31, 2015. As a result of our analysis, we made changes in the margin calculations. We recommend that you approve the positions we have developed in the *Discussion of the Issues* section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties:

- Comment 1: Eligibility for Separate Rate (Fangda Group and Xuzhou Jianglong)
- Comment 2: Whether Xuzhou Jianglong's Sale is *Bona Fide*
- Comment 3: Consumption of Needle Coke (Fangda Group and Fushin Jinly)
- Comment 4: Whether U.S. Sales are *Bona Fide* (Fangda Group and Fushin Jinly)
- Comment 5: Universe of Sales (Fangda Group)
- Comment 6: Reporting of Forming Scrap (Fangda Group)
- Comment 7: Claim for Silicon Carbide By-Product Offset (Fushin Jinly)
- Comment 8: Valuation of Certain By-Products/Scrap Items (Fangda Group and Fushin Jinly)
- Comment 9: Date of Sale (Fangda Group and Fushin Jinly)
- Comment 10: Tolling Data (Fangda Group)
- Comment 11: VAT Adjustment Calculation (Fangda Group)



Background

On March 9, 2016, the Department of Commerce (the Department) published the preliminary results of the administrative review of the AD order on SDGEs from the PRC.¹ The Department fully extended the final results of this review to September 6, 2016.² We invited interested parties to comment on the *Preliminary Results*. We received a case brief from SGL Carbon LLC and Superior Graphite Co. (the petitioners)³ and a rebuttal brief from the respondents,⁴ the Fangda Group,⁵ Fushun Jinly Petrochemical Co., Ltd., and Xuzhou Jianglong Carbon Products Co., Ltd (Xuzhou Jianglong). No party requested a hearing.

Scope of the Order

The merchandise covered by the order includes all small diameter graphite electrodes 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 8545.11.0010,⁶ 3801.10,⁷ and

¹ See *Small Diameter Graphite Electrodes from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission of Review In Part; 2014-2015*, 81 FR 12468 (March 9, 2016) (*Preliminary Results*), and the accompanying Preliminary Decision Memorandum.

² See Memorandum from Dmitry Vladimirov, International Trade Compliance Analyst, Office I, Antidumping and Countervailing Duty Operations to Deputy Assistant Secretary Christian Marsh entitled, "Small Diameter Graphite Electrodes from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated June 7, 2016.

³ See the petitioners' Case Brief dated April 18, 2016.

⁴ See the respondents' Rebuttal Brief dated May 11, 2016.

⁵ 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: Beijing Fangda Carbon Tech Co., Ltd., Chengdu Rongguang Carbon Co., Ltd. (Chengdu Rongguang), Fangda Carbon New Material Co., Ltd. (Fangda Carbon), Fushun Carbon Co., Ltd. (Fushun Carbon), and Hefei Carbon Co., Ltd.), 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).

⁶ The scope described in the order refers to the HTSUS subheading 8545.11.0000. We note that, starting in 2010, imports of small diameter graphite electrodes are classified in the HTSUS under subheading 8545.11.0010 and imports of large diameter graphite electrodes are classified under subheading 8545.11.0020.

8545.11.0020.⁸ The HTSUS numbers are provided for convenience and customs purposes, but the written description of the scope is dispositive.

Separate Rates

In the *Preliminary Results*, we found that, in addition to the two companies we selected for individual examination, Xuzhou Jianglong also met its eligibility for separate rate status by demonstrating that it operated free of *de jure* and *de facto* government control. Based on the information on the record of this review, we continue to find that the three companies that received separate rates in the *Preliminary Results* are eligible for separate rates.⁹

Neither the statute nor the Department's regulations addresses the establishment of a rate to be applied to companies not selected for individual examination when the Department limits its examination in an administrative review pursuant to section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act). Our prior 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. In the *Preliminary Results*, we calculated zero or *de minimis* weighted-average dumping margins for both companies selected as mandatory respondents. Although not directly relevant to this administrative review, section 735(c)(5)(B) of the Act provides that, where all margins are zero rates, *de minimis* rates, or rates based entirely on facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents. In the *Preliminary Results*, we determined that a reasonable method for determining the weighted-average dumping margin for Xuzhou Jianglong in this review was to base it on the rate of 21.16 percent that we calculated for the mandatory respondent, the Fangda Group, in the 2012-2013 review. For these final results of review, while we continue to calculate a zero or *de minimis* weighted-average dumping margin for Fushun Jinly, we calculated a weighted-average dumping margin that is above *de minimis* for the Fangda Group. Accordingly, we assigned to Xuzhou Jianglong the weighted-average dumping margin of 11.49 percent that we calculated for the Fangda Group in the final results of this review.

⁷ 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.

⁸ 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 SDGE produced and/or exported by Jilin Carbon Import and Export Company with an actual or nominal diameter of 17 inches.

⁹ See Comment 1 concerning our discussion of the Fangda Group's and Xuzhou Jianglong's separate rate eligibility.

Discussion of the Issues

Comment 1: Eligibility for Separate Rate (Fangda Group and Xuzhou Jianglong)

Fangda Group's Eligibility for a Separate Rate

The petitioners argue the following:

- The Department “employs a rebuttable presumption that the export-related decision-making of all enterprises operating within the NME is controlled by the government (whether at the central, provincial, or local level).”¹⁰ In analyzing whether a respondent has demonstrated the absence of *de facto* government control, the Department will analyze whether: (1) the export prices (EPs) are set by, or are subject to, the approval of a government agency; (2) the respondent has authority to negotiate and sign contracts and other agreements; (3) the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.
- Record evidence does not support the Department’s contention in the *Preliminary Results* that the Fangda Group has autonomy from the government regarding the selection of management for the following reasons.
 - In 2002, Fangda Carbon joined with the Fushun State-Owned Assets Supervision and Administration Commission (Fushun SASAC) to establish Fushun Carbon as a joint stock enterprise. During the POR, Fushun Carbon produced subject merchandise that Fangda Carbon exported to the United States.
 - The Fushun SASAC is a municipal branch of the State-Owned Assets Supervision and Administration Commission (SASAC), which is authorized by the State Council and acts under the supervision of the Chinese central government.
 - The Fushun SASAC owns a minority stake in Fushun Carbon.
 - The Fushun SASAC holds two of the seven seats on the Fushun Carbon Board of Directors and is also represented on the three-person Board of Supervisors.
 - Fushun Carbon’s Board Chairman, Mr. Xingming Liu, is a Fushun Municipality People’s Congress representative.
- In *Diamond Sawblades 4*, the Department denied the respondent in that case, Advanced Technology and Materials Co., Ltd. (ATM), a separate rate because it did not supply “information to rebut the presumption of government control.”¹¹ The record showed that

¹⁰ See the petitioners’ Case Brief at 3 (citing *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 121 F. Supp. 3d 1263, 1266 (CIT 2015) (*Jiasheng Photo*)).

¹¹ See the petitioners’ Case Brief at 5 (citing *Diamond Sawblades and Parts Thereof From the People’s Republic of China*; *Final Results of Antidumping Duty Administrative Review*; 2012-2013, 80 FR 32344 (June 8, 2015) (*Diamond Sawblades 4*), and the accompanying Issues and Decision Memorandum at Comment 1).

SASAC owned 100 percent of a company which, in turn, owned a majority share in ATM.¹² As in the case of ATM and SASAC in *Diamond Sawblades 4*, the Fushun SASAC was intricately involved in both the establishment and the management of Fushun Carbon (and therefore the Fangda Group), and the Fushun SASAC has the ability to appoint directors and supervisors to the company's board.

- The Fangda Group has not provided any evidence to rebut whether the Fushun SASAC has influence over the management of Fushun Carbon and, therefore, has not rebutted the presumption of *de facto* government control.
- Fangda Carbon is also significantly connected to the Chinese government through its ownership by Liaoning Fangda Group Industrial Co., Ltd. (Liaoning Fangda). Liaoning Fangda's website notes that "{i}t has adhered to the enterprise guideline 'responding to {the} Party's call and following {the} Party's instruction,' {and has} integrated many state-owned enterprises."¹³ The Fushun Carbon website also asserts, "Fangda Group Co., Ltd. must be unite {sic} around the party and the government."¹⁴
- The president and chairman of the Liaoning Fangda, Mr. Wei Fang, was a 12th National People's Congress (NPC) representative (or deputy) during the POR, through at least June 2014. Prior to his deputyship in the NPC, Mr. Wei Fang also held several other official provincial government positions.¹⁵ This history has given Mr. Wei Fang "powerful" government connections that have benefited the Fangda Group and its subsidiaries through "alliances with local governments to realize the goal of accelerating low-priced acquisitions of state-owned assets."¹⁶ One Chinese government news source has observed that Mr. Wei Fang keeps "tight control" over the Fangda Group companies, including Fangda Carbon, influencing senior company managers with a "quasi-military" managerial style.¹⁷
- At verification, the Fangda Group tried to minimize Mr. Wei Fang's governmental role, explaining that "Wei Fang never attended a People's Congress meeting and never cast a vote" but the Fangda Group offered no evidence to support this contention. Additionally,

¹² See the petitioners' Case Brief at 5 (citing Final Results of Redetermination pursuant to *Advanced Technology & Materials Co., Ltd., et al. v. United States*, 885 F. Supp. 2d 1343 (CIT 2012) (*Diamond Sawblades LTFV Remand 2*), and available at <http://enforcement.trade.gov/remands/12-147.pdf>, *aff'd Advanced Technology & Materials Co., Ltd., et al. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013), *aff'd Advanced Technology & Materials Co., Ltd., et al. v. United States*, Case No. 2014-1154 (CAFC 2014) at pages 6-7).

¹³ See the petitioners' Case Brief at 6 (citing the petitioners' May 22, 2015, submission, "6th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China - Petitioners' Comments on Fangda Carbon's Separate Rate Certification" (Petitioners' Comments on FG – SRC) at Attachment 5 (Fangda Group website hardcopy)).

¹⁴ *Id.*, at Attachment 1 (Fushun Carbon website hardcopy "Address from the Board Chairman").

¹⁵ The petitioners state that other provincial government positions held include Liaoning Province 10th People's Congress Representative, People's Supervisor at the Liaoning Province People's Procuratorate, and Liaoning Province Educational Fund Trustee Council member.

¹⁶ See the petitioners' Case Brief at 6 (citing Petitioners' Comments on FG – SRC at Attachment 8 (citing Xinhua News article dated July 1, 2014 "Shiliang Guo: Why Was Liaoning Province Fangda Group in Big Trouble?")).

¹⁷ See the petitioners' Case Brief at 6 (citing Petitioners' Comments on FG – SRC at Attachment 9 (citing Xinhua News article dated July 1, 2014 "Wei Fang Could Not be Contracted and His Three 'Fangda Companies'")).

how well Mr. Wei Fang performed his job as a representative in the 12th NPC is irrelevant. The record in this case demonstrates that the National's People's Congress is clearly an arm of the Chinese government.

- The basic constitutional authority vested in all representatives of the local People's Congresses is only magnified at the national level. Therefore, Mr. Wei Fang was imbued with significant governmental authority by virtue of his position as a National People's Congress representative.
- The constitutional responsibilities of local People's Congresses are not limited to the work of the Standing Committees within such Congresses. These responsibilities include such substantive activities as: (1) "ensur{ing} the observance and implementation of the Constitution and the law and the administrative rules and regulations in their respective administrative areas;" and (2) "adopt{ing} and issu{ing} resolutions and examin{ing} and decid{ing} on plans for local economic and cultural development and for the development of public services."¹⁸
- People's Congresses at the county level and above have additional powers, including to: (1) "examine and approve the plans for economic and social development and the budgets of their respective administrative areas and examine and approve the reports on their implementation;" and (2) "elect, and . . . recall, presidents of people's courts and chief procurators of people's procuratorates at the corresponding level."¹⁹
- Importantly, the full body of People's Congresses at the county level and above not only "elects, and has the power to recall, members of its standing committee,"²⁰ but also has "the power to alter or annul inappropriate decisions of their own standing committees."²¹
- Fangda Carbon maintains significant relationships with PRC government entities because it shares ownership and control of Fushun Carbon with the Fushun SASAC and Mr. Wei Fang, president and chairman of the Fangda Group, was a 12th NPC representative during the period of review (POR).¹⁰
- Considering the totality of the circumstances, as is the Department's practice,²² the Department must conclude in the final results that the Fangda Group has not successfully rebutted the presumption that it is subject to *de facto* government control and is, therefore, ineligible for a separate rate in this review.

¹⁸ See the petitioners' Case Brief at 7 (citing Constitution of the People's Republic of China (Chinese Constitution) at Articles 95-104, found on the record in petitioners' July 20, 2015, letter entitled, "6th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China – Petitioner's Comments on Xuzhou Jianglong's 1st Supplemental Response," (Petitioners' Comments on XJ - 1SQR) at Attachment 1).

¹⁹ *Id.* at Articles 99 and 101.

²⁰ *Id.* at Article 103.

²¹ *Id.* at Article 99.

²² See the petitioners' Case Brief at 3 (citing *Jiasheng Photo*, at 1263, 1266).

The Fangda Group argues the following:

- In the *Preliminary Results* the Department properly granted the Fangda Group separate rate status. The Department correctly determined that there was an absence of *de jure* control by the government of China over the operations of the Fangda Group based upon: “(1) an absence of restrictive stipulations associated with the individual exporter’s business and export licenses; (2) {the presence of} applicable legislative enactments decentralizing control of the companies; and (3) {the presence of} formal measures by the government decentralizing control of the companies.”
- The Department further determined that there was an absence of *de facto* control by the Government of China over the export operations of the Fangda Group. Record statements and supporting documentation show that the Fangda Group: “(1) sets its own EPs {export prices} independent of the government and without the approval of a government authority; (2) retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management.”
- During the POR, none of the Fangda Group companies were owned or controlled by, nor had any relationship with any national, provincial or local government. The absence of *de facto* government control of the Fangda Group’s export operations was fully supported by evidence in the administrative record in the *Preliminary Results* and should be followed in these final results.
- Fangda Carbon set the prices for the Fangda Group’s U.S. sales based solely upon its own negotiations with its U.S. customers, without the approval or review of any governmental entity, as stipulated by its sales negotiation documentation. The authority to contractually bind the company and to set sales prices rested solely with the authorized export sales manager and no organization outside Fangda Carbon reviewed or approved any aspect of the sales transactions. In accordance with Fangda Carbon’s Articles of Association, decisions concerning profit distribution are proposed by the Board of Directors and are submitted to the Shareholders’ Assembly for approval.
- The management of the Fangda Group companies is determined without interference or the approval of any level of the Chinese government. The general managers of the Fangda Group companies are selected by the Board of Directors of each company and the other senior managers are appointed by the Board of Directors through the nomination of the General Managers. The Fangda Group companies are not required to notify any governmental authority of the appointment or the identity of their managers. The Department verified the independent nature of Fangda Carbon’s export sales procedures, finding that the export manager and the Export Department conducted sales negotiations without government interference and were not subject to any reporting requirements.
- The Department also verified that Fangda Carbon appointed its Board of Directors and senior management without any involvement of any level of the Chinese government. The

Department stated and observed that the current directors and managers did not previously hold directorships or managerial positions in government entities and did not find any government involvement in the appointment of directors or managers.

- The Department's *de facto* test concerns whether there is evidence of government control "over export activities." In this case, Fushun Carbon, a producer and not an exporter of subject merchandise, did not have any export operations during the POR. All export operations concerning the subject merchandise for the Fangda Group companies were undertaken by Fangda Carbon. The existence of a minority SASAC ownership stake in just one of the production companies controlled by Fangda Carbon does not establish that Fangda Carbon's separate export operations are subject to any degree of government control.
- The Fushun SASAC ownership in Fushun Carbon is only a minority interest and it is not able to exert actual control over Fushun Carbon's operations. Generally, the SASAC's role is to supervise and preserve the value of state-owned assets invested in private companies (such as Fushun Carbon) and to perform the responsibilities of a share owner, *i.e.*, to vote in shareholder meetings.
- The Department verified that the Fushun Carbon Articles of Incorporation authorized the Fushun SASAC to appoint two members of the seven-member Board of Directors and one member of the three-member Board of Supervisors, and that the remainder of directorships are appointed by Fangda Carbon. The Fushun SASAC's representation on these Boards is actually less than the percentage of Fushun SASAC's share ownership in Fushun Carbon. Additionally, while the Fushun Carbon Board of Directors approves the appointments of management, the board is controlled by Fangda Carbon members.
- The situation in *Diamond Sawblades 5 Prelim* is distinguishable from that in this case; there, the Department denied separate rate status to a respondent on the basis that a SASAC was the one hundred percent ultimate owner of a respondent seeking separate rate status.²³ When there is one hundred percent direct or indirect equity ownership by a SASAC, then the SASAC, through its voting rights, has the ability to exercise complete control over a respondent's business operations.
- There is no merit to the petitioners' assertion that the Department should deny separate rate status to the Fangda Group because Mr. Wei Fang, the chairman of the company that exercises control over Fangda Carbon and the Fangda Group companies, was a member of the 12th NPC, the highest legislative body in the People's Republic of China during the POR. The NPC is a legislative body of elected representatives and is not an executive or

²³ See *Diamond Sawblades and Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 75854 (December 4, 2015) (*Diamond Sawblades 5 Prelim*). (The respondents state that the petitioners cited to *Diamond Sawblades 5 Prelim*, although the petitioners cited to *Diamond Sawblades 4*. The underlying details, however, are similar in both cases.)

administrative authority that can conceivably exercise regulatory power or exert control over the export operations of Fangda Carbon.²⁴

- Although Mr. Wei Fang was elected to the NPC in early 2014, he was removed from his legislative position prior to the 2014 legislative session. Consequently, he did not exercise any legislative authority during his legislative service and he was not active in the day-to-day affairs of the NPC. Further, the Department confirmed, as noted in the verification report, that “Wei Fang never attended a People’s Congress meeting and never cast a vote.”

Xuzhou Jianglong’s Eligibility for a Separate Rate

The petitioners made the following arguments:

- Xuzhou Jianglong is not eligible for a separate rate because it is subject to *de facto* Chinese government control.
- Xuzhou Jianglong stated in its separate rate application that its four shareholders do not have any “direct significant relationship” with the PRC government or its agencies.
- Xuzhou Jianglong failed to answer the Separate Rate Application (SRA) question as to whether individual owners hold, or have held, office at any level of the PRC government or within its agencies when it stated in its SRA at 13 that it is “not owned by any shareholder entities.” Publicly available information contradicts Xuzhou Jianglong’s claim that its shareholders do not have any “direct significant relationship” with the Chinese government and demonstrates that Shareholder A held a government office. Xuzhou Jianglong, therefore, is not independent of state control and is not eligible for a separate rate.
- Shareholder A and three other individuals fully own and control Xuzhou Jianglong.²⁵ Shareholder A has certain connections with the other three owners which provide Shareholder A with complete control of Xuzhou Jianglong and a subsidiary.²⁶

²⁴ The Fangda Group asserts that a People’s Congress representative position does not entail any judicial, executive or administrative authority; and the legislative authority of the People’s Congress representative at any level is quite limited. With respect to the NPC, the representatives attend the annual legislative session each autumn, coinciding with the National Day holiday; the position is honorary; it is not a full time position, and no people’s congress position at any level is paid; the individual merely attends the annual People’s Congress meeting; and the person fulfills the legislative obligation by approving previously prepared legislation and approving previously selected government officials, and the government’s annual working report. The Fangda Group asserts that the real legislative powers rest with the appointed full-time committees within the People’s Congress, rather than with the elected representatives; like legislative bodies in other authoritarian systems, the NPC in China is essentially a rubber stamp institution.

²⁵ See Xuzhou Jianglong’s Letter entitled, “Small Diameter Graphite Electrodes from the People’s Republic of China; Separate Rate Application of Xuzhou Jianglong Products Co. Ltd.,” dated May 5, 2015 (XJ - SRA) at 12.

²⁶ See Memorandum to File, “Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People’s Republic of China: Final Results Business Proprietary Memorandum for Xuzhou Jianglong,” dated concurrently with this memorandum (Xuzhou Jianglong Business Proprietary Memo) at 2 for certain supporting arguments that are business proprietary in nature.

- Shareholder A served as a representative to the Xuzhou County People’s Congress,²⁷ a representative of the Peixian County People’s Congress²⁸ and as a representative to the Longgu Town People’s Congress during the POR. As such, there is government involvement in the management decisions made by Shareholder A in Xuzhou Jianglong.
- Shareholder A’s role as a representative to the Xuzhou County People’s Congress is relevant to the Department’s analysis because County People’s Congresses are a direct arm of the central People’s Government at the county level and its representatives have ultimate governmental authority.
- The NPC of the People’s Republic of China website states that the NPC is the supreme organ of state power in China and is composed of NPC deputies who are elected according to law from 35 electoral units from the People’s Congresses of provinces, autonomous regions, and municipalities directly under the Central Government.
- In *Brake Rotors*, the Department demonstrated that county government entities are subject to government control and may “operate under the leadership of the Chinese Communist Party.”²⁹ Xuzhou Jianglong insisted, however, that because Shareholder A does not serve on the Standing Committee of either People’s Congress, that Shareholder A has only nominal legislative powers limited to approving legislation previously passed by the Standing Committee.³⁰
- Public information available on the record confirms that Shareholder A is a “Chinese Communist Party Member.”³¹
- The nature of Shareholder A’s role within the People’s Congress is irrelevant to whether the government exercises *de jure* or *de facto* control over Xuzhou Jianglong. The Department is not in a position to determine the internal authority wielded by a member of the People’s Congress. Moreover, Xuzhou Jianglong admits that members of People’s Congresses must take direction from the Standing Committees of the People’s Congresses.³² Thus,

²⁷ See Xuzhou Jianglong’s Letter entitled, “Small Diameter Graphite Electrodes from China: 1st Supplemental Response of Xuzhou Jianglong Products Co. Ltd.,” dated July 10, 2015 (XJ – 1SQR) at 3, 5, and Appendix S1-1 (Shareholder A is not a representative to the Xuzhou Municipality People’s Congress; he is a representative to the Peixian County People’s Congress).

²⁸ See XJ – 1SQR at 3 (refers to the Peixian County People’s Congress, respondents’ Rebuttal Brief at page 68 refers to it as the Pei County People’s Congress, we rely on the former throughout).

²⁹ See the petitioners’ Case Brief at 10 (citing *Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937 (November 18, 2005) (*Brake Rotors*), and the accompanying Issues and Decision Memorandum at 18).

³⁰ Because only the Standing Committee in each local Congress wields actual legislative power, Xuzhou Jianglong’s reasoning continues that, “the position of a representative to the local People’s Congress is ceremonial in nature and acts as a rubber stamp to legislative actions previously taken by the Standing Committee” and that as a representative he exercises no judicial or executive authority.

³¹ See Petitioners’ Comments on FG – SRC at Attachment 4.

³² See XJ – 1SQR at 2-3, 5.

Shareholder A serves as a direct link between the Chinese government and Xuzhou Jianglong.

- The record does not support the assertion that Shareholder A has no executive authority. The Constitution of the People's Republic of China establishes the "local People's Congresses...in provinces, municipalities directly under the Central Government, counties, cities, municipal districts, townships, nationality townships, and towns," and sets forth their organizational structure and authorities.³³
- The petitioners reiterate the basic constitutional powers of the People's Congresses at the lower levels of administration and the powers of the People's Congresses at the county level and above (as stated in their arguments concerning the Fangda Group). Further, the petitioners argue that basic constitutional authority is vested in all representatives of the local People's Congresses, including the ability to amend and veto decisions of their Standing Committees, and that these powers belie Xuzhou Jianglong's claim that "People's Congresses do not exert the administrative or executive authority of the PRC Government."
- Xuzhou Jianglong provided no evidentiary support for its blanket assertion that positions held in local People's Congresses, if not on the Standing Committee within the particular congress, are merely ceremonial or nominal in nature. On the contrary, the {Peixian} County People's Congress website makes clear that Shareholder A has been involved in numerous substantive governmental activities since 2008.³⁴ Although Xuzhou Jianglong acknowledges that, as a local People's Congress representative, Shareholder A can "express his views or air grievances with respect to local matters," it is also apparent that his governmental authority extends far beyond what Xuzhou Jianglong claims.
- Government control over Xuzhou Jianglong and its affiliates is further evidenced by the fact that Shareholder A and Shareholder B serve as current shareholders and directors of Xuzhou Jianglong.³⁵

Xuzhou Jianglong argues the following:

³³ See Petitioners' Comments on FG - SRC at Attachment 1.

³⁴ See XJ – SQR at pages 6. These activities were performed by the Peixian County People's Congress during the POR: the 16th Peixian County People's Congress Convention in March 28-31, 2014, the Longgu Town People's Congress on March 11, 2014, and an inspection of the moat and waste water processing plants on April 24, 2014. In prior years activities included the assessment of Longgu Town industrial and agricultural economy and social development; examination of implementation of "Proposed Rescinding of Peilong Road Toll Station" policy; inspection of agricultural industrial adjustments; inspection of construction of "Three Greenhouses" in Longdong Village;; participation in a "Three Ones" event: propose one policy, provide one piece of advice, and complete one activity *i.e.*, the policy proposed was to strengthen "implementation of preferential policies of solicited investments and improve soft investment environments"; specialized investigation on food security supervision and oversight; inspection of educational institution service; and inspection of construction of new rural villages.

³⁵ See Xuzhou Jianglong Business Proprietary Memo at 2 for certain supporting arguments that are business proprietary in nature.

- The Department properly granted Xuzhou Jianglong separate rate status in the *Preliminary Results*. The Department correctly determined that there was an absence of *de facto* control by the Government of China over the operations of Xuzhou Jianglong based upon the record statements and supporting documentation showing that it: “(1) set its own EPs independent of the government and without the approval of a government authority; (2) retained the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; (3) had the authority to negotiate and sign contracts and other agreements; and (4) had autonomy from the government regarding the selection of management.”
- Xuzhou Jianglong operates free from control of the Chinese government.³⁶
- Shareholder A’s service as a representative of the County People’s congress does not constitute evidence that Xuzhou Jianglong’s export operations are *de facto* controlled by the Chinese government.³⁷
- Shareholder A was elected directly as a representative to the Peixian County People’s Congress based on his profession of entrepreneur and he continues to work full time at Xuzhou Jianglong and its affiliated companies. Being a delegate in a People’s Congress is an honorary position for which there is no monetary remuneration and delegates continue in their full time positions. In his role as shareholder of Xuzhou Jianglong, Shareholder A does not have any relationship with national, provincial, or local governments.
- Article 46 of the *Law of the People’s Republic of China on Representatives to the National People’s Congress and Representatives to Local People’s Congresses (2010 Amendment)* states that “Representatives shall correctly handle the relations between their personal professional activities and their performance of duties as representatives.” Therefore, Shareholder A cannot involve his company business in the affairs of County People’s Congress.
- The legislative activities in which Shareholder A participated in at the People’s Congress establishes that these People’s Congresses had no impact on Xuzhou Jianglong’s export activities.

³⁶ Because: (1) Xuzhou Jianglong is owned by four individuals that do not have any direct significant relationship with the PRC government or its agencies; (2) Xuzhou Jianglong had complete autonomy from the government regarding the selection of management because according to Article 35 of its Articles of Association, the Board of directors appoints the general manager, and the general manager nominates the remaining managers with the approval by the Board of Directors and the company is not subject to any governmental reporting requirement concerning changes to its management; (3) Xuzhou Jianglong negotiated its export sales with its customers without any interference or approval from the government; and (4) Xuzhou Jianglong made independent decisions regarding the disposition of profits or financing of losses.

³⁷ Shareholder A is not a Chinese government official who has, or exercises, any executive authority. People’s Congresses are not administrative authorities and should be distinguished from government entities that exert regulatory powers. A People’s Congress is not an arm of the government and is not an arm of the Chinese Communist Party. Also, as a representative to the County People’s Congress, Shareholder A is elected directly by his constituents, rather than being appointed by the government.

- Xuzhou No. 5 Electrode Factory was privatized many years ago and at that time Xuzhou Jianglong became a privately held company, in accordance with Chinese law and procedures for limited liability companies. Xuzhou Jianglong is no longer a collectively-owned enterprise controlled by the government. Xuzhou Jianglong's business license expressly states that it is a limited liability company. The company operates free from government control and is run independently by its shareholders who do not hold any positions in the national, provincial, or local governments.

Department's Position: The Department considers the PRC to be a non-market economy country under section 771(18) of the Act. In AD proceedings involving non-market economy countries, such as the PRC, the Department has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence.³⁸ However, if an exporter can demonstrate an absence of government control, both *de jure* and *de facto*, with respect to exports, then it is eligible for a rate separate from the non-market economy. In our *Preliminary Results* we explained our practice with respect to determining if there is an absence of *de jure* and *de facto* government control.³⁹ Specifically, to determine whether there is an absence of *de facto* government control of an enterprise's export functions, we examine whether: (1) the export prices are set by, or are subject to the approval of, a government agency; (2) the respondent has authority to negotiate and sign contracts and other agreements; (3) the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.⁴⁰ Here, we are faced with arguments concerning whether the owners,' board members' or senior managers' positions as deputies in the People's Congresses, at various levels of the administration of the PRC, amount to paths or linkages over which *de facto* government control of a private company can operate. We must also examine whether the holding of a minority stake of a producing entity which is a subsidiary of the exporter, by a local SASAC entity, amounts to *de facto* government control of a larger group of companies. As detailed below, in general and based on the totality of the circumstances, we find that there is an absence of government control over the Fangda Group and Xuzhou Jianglong.

We disagree with the petitioners' assertions that Mr. Wei Fang's concurrent positions as a deputy in the NPC and as the owner of the Fangda Group, as well as the role of Fushun Carbon's Board Chairman, Mr. Xingming Liu as a Fushun Municipality People's Congress deputy amount to *de facto* control of the Fangda Group.⁴¹ Further we disagree with petitioners that Shareholder A's concurrent positions as an owner of Xuzhou Jianglong and deputy in the Peixian County People's Congress and the Longgu Town People's Congress, as well as, Shareholder A's

³⁸ See, e.g., *Sigma Corp. v. United States*, 117 F.3d 1401, 1405-6 (CAFC 1997).

³⁹ See *Preliminary Results* and the accompanying Preliminary Decision Memorandum at pages 5 through 6.

⁴⁰ *Id.* at page 6.

⁴¹ Additionally, one senior official in Chengdu Rongguang held a post in an SOE prior to the POR. See Memorandum to File, "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Final Results Analysis Memorandum for the Fangda Group," dated concurrently with this memorandum (Fangda Group Analysis Memo) at 3 where we discuss the business proprietary details of these relationships.

membership in the Communist Party amount to the *de facto* control of Xuzhou Jianglong. For these final results, we continue to determine that the record supports finding an absence of *de facto* government control over the export activities of these companies. The record does not show that these companies' directors, owners, or senior managers' positions in certain government bodies or Shareholder A's membership in a certain political organization outweigh the record evidence of autonomy on the part of the companies to set prices, negotiate and sign agreements, select management, or decide how to dispose of profits or finance losses with respect to export activities.⁴² Under similar circumstances, the CIT rejected the same kind of arguments the petitioners make in the instant case, holding that “{b}eyond emphasizing the legal and practical possibility that the company officials who are also in some capacity government officials could have influenced these companies' export sales negotiations,” Solar World had “not pointed to any specific evidence that, in influencing the companies' operations pursuant to their duties as company officials . . . these persons were directing the companies' export pricing decisions based on the will of the PRC government.”⁴³ The CIT also affirmed the Department's determination that “despite the systemic cross-contamination of personnel between the government and the commercial sector within the PRC, these companies exhibited sufficient localized control over their own export activities during the POI to warrant individualized rates.”⁴⁴ In the instant case, we are faced with similar circumstances and, therefore, draw the same conclusions.

Specifically, with respect to the Fangda Group, the record indicates that:

- The Fangda Group reported that Mr. Wei Fang was a 12th NPC representative for a period at the beginning of the POR but was removed from this position on June 27, 2014, before attending a legislative session of the 12th NPC.⁴⁵ A Chinese news article on the record states that Mr. Wei Fang lost this position due to allegations of corrupt practices in the methods he used to acquire Chinese state assets, including probably Fushun Carbon.⁴⁶

⁴² See *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 76970 (December 23, 2014) (*Solar Cells PRC*) and the accompanying Issues and Decision Memorandum at Comment 6. (Where one respondent's Chairman and CEO was a member of the NPC, another respondent had an important official on the NPC and yet another had an important official on a City People's Congress. These relationships featured no concurrent government ownership.)

⁴³ *Id.* citing *Jiangsu Jiasheng Photovoltaic Tech.*, Slip Op. 14-134 at 68-69, n.159 (citations omitted) (“Solar World argues that requiring it to produce such evidence in challenging Commerce's grant of separate-rate applications would impermissibly shift the burden of proof to the domestic industry, when the burden is properly on the respondents to rebut the presumption against their autonomy. . . . But, as previously mentioned . . . the submission of relevant credible evidence (*i.e.*, evidence that is both relevant to the presumed fact and not subsequently discredited) disposes of the presumption, which is not evidence and only operates in the absence of relevant credible evidence.”).

⁴⁴ See *Solar Cells PRC* citing *Jiangsu Jiasheng Photovoltaic Tech.*, Slip Op. 14-134 at 67-68 (citations omitted). The petitioners' citation to *Jiasheng Photo* are inapposite considering the *Solar Cells* finding we are relying on this matter.

⁴⁵ See Fangda Group's supplemental questionnaire response dated October 27, 2015 (FG – SACQR) at page S1-2. See also, Memorandum to File, “Verification of the Questionnaire Responses of the Fangda Group in the Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China” dated February 10, 2016 (Fangda Group Verification Report) at page 9. See also, Petitioners' Comments on FG – SRC at Attachments 7, 8, and 9. The NPC usually conducts their legislative session in March; the first such session during the POR was in March 2015.

⁴⁶ See Petitioners' Comments on FG – SRC at Attachments 9.

- Mr. Wei Fang held a variety of other public positions in the past;⁴⁷ however, there is no indication from record evidence that any of his public roles, those held in the past or during the POR, allow for him to exert *de facto* control for the Chinese government over the Fangda Group's export activities.
- Additionally, Mr. Xingming, Fushun Carbon Chairman of the Board, also held a position as deputy of the Fushun Municipality People's Congress during the POR.⁴⁸ Again, there is no record evidence that this post amounts to a path through which Mr. Xingming is able to exert *de facto* government control over Fushun Carbon.
- The Fangda Group reported, under certification, that no government body had a role in any of the Fangda Group's operations or that its owners, directors, or senior managers were not operating under the direction of the Chinese government.

For these reasons we find that the Fangda Group had control over its export functions.

Additionally, with respect to Xuzhou Jianglong, the record indicates that:

- Shareholder A was a deputy of the Peixian County People's Congress and the Longgu Town People's Congress during the POR⁴⁹ and that Shareholder A was not a deputy of the Xuzhou Municipality People's Congress.⁵⁰
- Shareholder A is a member (but not an official) of the Chinese Communist Party.⁵¹
- Xuzhou Jianglong reported, under certification, that no government body had a role in Xuzhou Jianglong's operations and that its owners, directors, or senior managers had significant relations with the Chinese government.

Although People's Congress members are government officials the constitutional powers granted to People's Congress members by the Chinese Constitution, both at above and below the county level, as described by the petitioners, do not establish that those powers instill *de facto* control over the export activities of business enterprises under the direction of the individuals that hold deputyships in the People's Congresses amounting to *de facto* control.⁵² Additionally, there is no record evidence of *de jure* control; even an expansive reading of the Article 99 powers of the local People's Congresses, or of the Article 101 powers of the county level and above People's Congresses cited by the petitioners falls short of establishing *de jure* control of companies. Further, a *de facto* finding of control based on the fact that these powers reside in individuals who also control companies is untenable, because there is insufficient evidence of how these powers were employed to control the owners (or board members or senior managers) through

⁴⁷ See Petitioners' Comments on FG – SRC at Attachment 7.

⁴⁸ See *id.* at Attachment 3 (Mr. Lui Xingman was credited as a People's Congress Representative January 10, 2014).

⁴⁹ See XJ – 1SQR at pages 3 and 5.

⁵⁰ See *id.* at page 3 and Attachment S1-1. There was some confusion in the petitioners' arguments concerning the deputyships that Shareholder A in Xuzhou Jianglong held concurrent with the POR. There is sufficient record evidence that those deputyships amount to the two mentioned above and that Shareholder A does not also hold a deputyship in the Xuzhou Municipality People's Congress, as asserted by the petitioners, and that any reference to Xuzhou County People's Congress is equivalent to the Peixian County People's Congress, one of the county level People's Congresses of Xuzhou Municipality.

⁵¹ See Petitioners' Comments on XJ – SRA at Attachment 4.

⁵² See Petitioners' Comments on XJ – 1SQR at Attachment 1, Articles 95-104.

their legislative office. Furthermore, individuals discussed in the instant review were not members of the Standing Committees of the People's Congresses in which they held deputyships.

The other potential means of control derived from the constitutional powers of the representatives to People's Congresses presented by the petitioners are untenable as means of deriving control of companies's export activities (by People's Congresses or their deputies who are also corporate owners, board members or senior managers of private businesses), in light of the respondents' claims that these representative posts are honorary and do not entail the actual application of normal legislative power. Additionally, there is a complete lack of evidence that the Article 99 and Article 103 powers of county level and above People's Congress representatives are ever used by those representatives, or, more specifically, by the People's Congresses in question. In fact, there is no evidence on the record that any of the powers discussed by the petitioners are employed in practice. For example, with respect to the Article 99 and 103 powers of county level and above People's Congress representatives, no evidence came to light during the course of this administrative review, with respect to the full legislature of the People's Congresses acting to alter or annul the decisions of their Standing Committees, or acting to recall Standing Committee members, despite the *de jure* powers granted to these legislative bodies by the Chinese Constitution.⁵³ Also, no arguments concerning the ramifications of the power of the representatives of People's Congresses to elect members of the Standing Committee were alleged.⁵⁴

Without examples of these constitutional powers being employed in a way that amounts evidence of *de facto* control over export activities exercised by the government through the individual owners, board members, or senior managers, the respondents' certified claims that the positions are honorary, and that the legislatures are perfunctory in nature, cannot be discredited. A finding of control would necessarily be predicated on explanations of how the actions of the representatives of People's Congresses allowed the government to direct the export related activities of the companies involved through the overlap between the government and the individuals.

Simply listing the powers granted by the Chinese Constitution, which are *prima facie* unrelated to the state controlling businesses' export activities, and naming the events that People's Congress deputies attended, does not amount evidence of *de facto* control over export activities.⁵⁵ For example, the only People's Congress activity cited by the petitioners which Shareholder A attended during the POR was the inspection of water moats and water processing plants.⁵⁶ We find that this activity does not relate to controlling individual companies under the jurisdiction of the People's Congress in question. We also find that similar inspections and other activities do not amount to a source of *de facto* government control over export activities when the owner of a

⁵³ *Id.* at Articles 103 and 99.

⁵⁴ *Id.* at Article 103.

⁵⁵ See *Jiangsu Jiasheng Photovoltaic Tech.*, Slip Op. 14-134 at 68-69, n.159. Both the Fangda Group and Xuzhou Jianglong provided ample evidence that they set prices, negotiate and sign agreements, select management, and decide how to dispose of profits or finance losses. The petitioners have not discredited these statements, rather, they see the People's Congress members which are owners, directors, or managers as the conduit of state control.

⁵⁶ See XJ – SQR at 6.

business participates in such activities when acting as a People's Congress representative.

The petitioners allude to the Chinese Communist Party's call to propel integration of state-owned enterprises (SOEs) with privately held companies as an attempt to suborn private enterprise to the control of SOEs.⁵⁷ However, in this instance, a private enterprise and an SOE (later a local SASAC after reorganization) established a company under majority ownership and under the direction of a private enterprise.⁵⁸ Although, it appears that Mr. Wei Fang leveraged his connections with local governments to buy state assets at a steep discount, there is no record evidence that these transactions bound him to the government. In fact, it would seem that the means through which he purchased these assets led to his disfavor by the government. In fact, during the POR, he was deposed from his 12th NPC deputyship.⁵⁹ Further, the Fushun Carbon website statement that it is "united around the party and government"⁶⁰ does not, in and of itself, establish that the Fangda Group operates under the direction of the Chinese government.

Liaoning Fangda, the Fangda Group's parent company, which is controlled by Mr. Wei Fang, established Fushun Carbon in 2002 and owned a majority stake in its operations.⁶¹ The record does not indicate that this investment in partnership with an SOE results in *de facto* control of the Fangda Group's export activities by the PRC government during the POR. Record evidence indicates that the Communist Party announced previously that shares in certain SOEs were for sale and that Mr. Wei Fang took advantage of this opportunity to purchase production assets at a discount. There is no information on the record that would allow us to discern whether the Fangda Group was purchasing these assets under the direction of the Chinese government. In the instant case, the Fangda Group, unlike the respondent in *Diamond Sawblades 4*, supplied "information to rebut the presumption of government control."⁶² Based on our review of this information, we find an absence of *de facto* control.

At verification, we traced the provenance of the boards of Fushun Carbon and found that the Articles of Association were operable and in force, such that the Fushun SASAC only selected two of seven Board Members and one of three Board Supervisors.⁶³ Based on record evidence, we find that this level of representation does not allow Fushun SASAC to control the operations of Fushun Carbon, let alone the operations of the Fangda Group exporter, Fangda Carbon (which is Fushun Carbon's parent).⁶⁴ We find that the Fangda Group has provided sufficient evidence to establish that there is an absence of *de facto* government control related to the Fushun SASAC's ownership interest.

We agree with the respondents that the ownership stake of Fushun SASAC in the instant review, compared to that of SASAC in *Diamond Sawblades 4*, in *Diamond Sawblades Remand 2*, or in

⁵⁷ See Petitioners' Comments on FG - SRC at Attachment 5.

⁵⁸ See Fangda Group Analysis Memo at 2-3 for business proprietary details of the ownership of Fushun Carbon.

⁵⁹ See Petitioners' Comments on FG - SRC at Attachment 8.

⁶⁰ See *id.* at Attachment 5.

⁶¹ See also, Fangda Group's Section A questionnaire response, dated June 9, (FG – AQR) at page A-16.

⁶² See *Diamond Sawblades 4* and the accompanying Issues and Decision Memorandum at page 6.

⁶³ See Fangda Verification Report at 8, and Exhibit 3.

⁶⁴ See Fangda Group Analysis Memo at 2-3 for business proprietary details of the ownership of Fushun Carbon.

*Diamond Sawblades 5*⁶⁵ (collectively, *Diamond Sawblades*), are distinguishable and lead to different findings than those in *Diamond Sawblades*. In *Diamond Sawblades*, *de facto* control traced through complete SASAC ownership of the China Iron and Steel Research Institute Group (CISRI), a specialty subsidiary of SASAC, to significant ownership in ATM,⁶⁶ and the SASAC, via CISRI, was, therefore, able to exert *de facto* control over the single entity of which ATM was a member.⁶⁷ There was also significant overlap of board members and managers between CISRI and ATM.⁶⁸ CISRI either placed its own board members on the ATM board or selected individuals to fill board positions. Individuals who were both CISRI and ATM board members controlled the top board positions in ATM including the chairmanship, and CISRI was able to select the entire board of ATM and maintain that control even after its share ownership had fallen below the majority threshold.⁶⁹ There was also a clear pattern of movement of personnel between the ATM single entity and CISRI.⁷⁰

In the instant review, the situation of Fushun SASAC is different to that of CISRI's in *Diamond Sawblades*.⁷¹ As described above, the Fushun SASAC has only a limited ability to select the board members of Fushun Carbon and it can only select board members in a number which is insufficient to control the Board of Directors of Fushun Carbon or to establish a majority of the directors of the Fushun Carbon Board of Directors. As described above, we find that Fushun Carbon's Board of Directors is able to operate independent of government control. In addition, there is no overlap between the boards of the Fushun SASAC with that of Fushun Carbon or of Fangda Carbon.⁷² Without such overlap, Fushun SASAC lacks a clear path of control from the Fushun SASAC selected board members on the Fushun Carbon boards (and their insufficient votes to control) to exert control over the Fangda Carbon boards and the export functions of the Fangda Group which are conducted by Fangda Carbon under the control of its boards. Additionally, Fushun SASAC's voting power over the Fushun Carbon Board of Directors is less representative than its share of ownership. Therefore, we find that the Fangda Group controls Fushun Carbon, because it holds more than sufficient voting rights on the Fushun Carbon board to control the company and appoint whom it desires to the boards of Fushun Carbon including five of seven seats on the Board of Directors and one Supervisor.⁷³ Here, the minority stake

⁶⁵ Or in *Diamond Sawblades 5 Prelim* unchanged in *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, (81 FR 38673) June 14, 2016, (*Diamonds Sawblades 5*).

⁶⁶ CISRI owned slightly more than a majority at the outset of the POI and slightly less than a majority of the company at the close of the POI. See *Diamond Sawblades LTFV Remand 2* at page 8.

⁶⁷ Including exerting control over ATM's wholly owned subsidiary Beijing Gang Yang Diamond Products Company (BGY) which was the manufacturer and exporter. See *Diamond Sawblades LTFV Remand 2* at pages 8 and 9.

⁶⁸ See *Diamond Sawblades LTFV Remand 2* at page 9.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ The petitioners cite to *Diamond Sawblades 4* and the respondents cite to *Diamond Sawblades 5 prelim*. The only change between the LTFV investigation and these later reviews is the share in CISRI ownership in ATM fell slightly and the overlap between CISRI, ATM, and BGY changed but not substantially.

⁷² See FG – ACSQR at page S1-5. See also, Fangda Verification Report at Exhibit 3.

⁷³ The Articles of Association stipulate that the Board of Supervisors contains one representative from Fangda Carbon, one from the Fushun SASAC, and one employee representative. The Board of Supervisors can step in to take control of the Board of Directors given certain malfeasance; however, this power was not invoked during the POR. See Fangda Verification Report at Exhibit 3.

controlled by the Fushun SASAC in Fushun Carbon is insufficient to support a finding that the small portion of the Fangda Group capital that is represented by the Fushun SASAC's ownership in the Fangda Group (through its ownership of a minority stake of Fushun Carbon) can be characterized as a path to controlling the Fangda Group's export activities.⁷⁴ For this reason, we find that the Fangda Group has provided adequate information to rebut the presumption of *de facto* government control, and that its evidence on these matters has not been discredited, with respect to the ownership interest of the Fushun SASAC in Fushun Carbon and in the Fangda Group.

The petitioner suggests that Mr. Wei Fang's prior holding of government positions and any personal relationships established out of these positions is indicative of government control and that such control flows through to the Fangda Group. However, the record does not contain any verifiable evidence that these posts or alleged relationships within the government lead to *de facto* government control of the Fangda Group's export activities. In *Solar Cells PRC*, we found that such tenuous evidence did not support a finding of government control.

With respect to Xuzhou Jianglong, the petitioners argue that *Brake Rotors* demonstrates that county government entities are subject to government control and may operate under the leadership of the Chinese Communist Party. We do not find *Brake Rotors* instructive in this case because it focused on a Village Committee's control over a company where the Village Committee was inextricably involved in the export-related decisions of the company and was so involved in company affairs that we were unable to determine the difference between the company and the Village Committee.⁷⁵ Information on the record of this review indicates that an owner of Xuzhou Jianglong held deputyships at the county and town level People's Congresses, not that either of those bodies was directly involved in the export-related decision making of Xuzhou Jianglong. In *Brake Rotors* we found that a Village Committee was a form of the PRC government.⁷⁶ This form of government is operable below the town level and the law was promulgated because such administration is not provided for in the Chinese Constitution. Although there is no mention of county level People's Congresses in *Brake Rotors*, the decision does stipulate that the law at issue (which defines the powers of the Village Committee) is promulgated by Standing Committees of the People's Congress of provinces, autonomous regions, and centrally-administered municipalities (the level above counties, and two above towns in the administrative hierarchy of the PRC⁷⁷) which exerts control by implementing this law in accordance with regional conditions and allows for control by party cadres and higher levels of government.⁷⁸ The situation at hand is not similar to that in *Brake Rotors*, as there is no record evidence that any part of a People's Congress is involved in the operations of the company like the Village Committee was in *Brake Rotors*. Also there is no information on the record that would allow us to determine whether Shareholder A's status in the Chinese

⁷⁴ Actual ownership amounts are business proprietary in nature and are discussed in greater detail in the Fangda Group Analysis Memo at 2-3.

⁷⁵ See *Brake Rotors* and the accompanying Issues and Decision Memorandum at pages 19-20.

⁷⁶ *Id.* at page 20.

⁷⁷ The Village Committee is not enumerated in the Chinese Constitution as a level of administration like provincial, county and town People's Congresses but is empowered by separate legislation as discussed in *Brake Rotors* at pages 18-19.

⁷⁸ *Id.* (here party cadres refers to members of the Chinese Communist Party).

Communist Party⁷⁹ effects his control of Xuzhou Jianglong, and we continue to rely on *Solar Cells PRC* in that regard.

With respect to the petitioners' contention that Xuzhou Jianglong did not respond to our SRA question concerning whether "individual owners hold or have held office at any level of the PRC government or within its agencies" when it answered that "Xuzhou Jianglong is not owned by any shareholder entities,"⁸⁰ we find that this is a mischaracterization of the specific information sought by the SRA and we find Xuzhou's Jianglong's response to this question adequate. SRA section IV, question 5 asks the applying firm whether any of the "top ten individual owners...of {its} intermediate and ultimate shareholding entities...hold or have held office at any level of the PRC government." We find that Xuzhou Jianglong's response to this question, that it "is not owned by any shareholder entities" is appropriate because, as it stated⁸¹ and the petitioners recognized,⁸² Xuzhou Jianglong is owned by four unincorporated individuals. Xuzhou Jianglong responded to the relevant questions about relationships between individual unincorporated owners and the government in the SRA when it responded to section IV, questions 3 and 4A concerning its individual shareholders.⁸³

Xuzhou Jianglong responded to section IV, question 3 of the SRA with the details of its four owners and this response is adequate. Xuzhou Jianglong's response to section IV, question 4A of the SRA is adequate when viewed in the light of the totality of its response. The SRA at section IV, question 4A asks an applicant to report, in detail, any significant relationship with a state asset management company, or any ministry or agency of the PRC government during the POR. Xuzhou Jianglong answered that its four owners do not have any "direct significant relationship" with the entities in question.⁸⁴ We asked Xuzhou Jianglong in a supplemental questionnaire what it meant by "direct" and "significant" in its response to section IV, question 4A. Xuzhou Jianglong responded that the word "significant" is defined in footnote 14 of the Department's SRA to indicate the kind of relationship between the PRC government or a PRC government agency at the national, provincial or local levels that "would include ownership, control, affiliation, significant transactions, etc."⁸⁵ Xuzhou Jianglong also stated that the SRA does not define the term "direct" and explained that in the context of a relationship with the PRC government, Xuzhou Jianglong understands the term "direct relationship" to signify that the PRC government holds shares in the company or is an entity shareholder, that the PRC government has the authority to appoint or approve company directors or senior management, that directors or senior management hold official positions in the PRC government, or that the PRC

⁷⁹ We note that the evidence only states that Shareholder A is a "member" of the Chinese Communist Party, not an official of that Party.

⁸⁰ See XJ – SRA at page 13 answering section IV, question 5. Although Xuzhou Jianglong answered section IV, question 4B (concerning shareholder entity's and boards of directors) the same way it appears that the petitioners' reference to "individual" and "hold or have held office at any level of the PRC government" refers to section IV, question 5.

⁸¹ See XJ – SRA at page 11 (if there are no entity shareholders than the owners are individuals unless they are incorporated individuals).

⁸² See petitioners' Case Brief at page 9.

⁸³ See XJ – SRA at pages 12 and 13.

⁸⁴ See *id.* at page 13 (emphasis added).

⁸⁵ See XJ – SQR at page 1.

government otherwise exerts operational control of the company.⁸⁶ Although Shareholder A's deputyships at the county and town level make him a government official, they are not "significant" relationships in this context based on our definition of "significant," and our understanding of the power of the deputies in People's Congresses. The SRA at section IV, question 4A only asks about "significant relationships," and therefore, there was no need to report these in response to this question. We asked for their definition of "direct" in order to determine whether their notion of "direct significant relationships" differed from our notion of "significant relationship." Xuzhou Jianglong's definition of "direct" does not appear to preclude types of relationships that we would consider to be significant.

With respect to arguments concerning the transition of Xuzhou No. 5 Electrode Company to its current status as the limited liability company Xuzhou Jianglong, we find that its operations as a SOE and any positions held within it at the time that it was state-owned do not demonstrate that Xuzhou Jianglong's export activities were controlled by the PRC government during the POR.⁸⁷

We considered the information on the record and parties' arguments concerning this information and find that the respondents have demonstrated an absence of *de jure* and *de facto* control over their export activities. As discussed above, the petitioners' arguments concerning the powers of various deputies of People's Congresses, as well as specific tasks undertaken by owners of the Fangda Group and Xuzhou Jianglong while fulfilling their obligations to the People's Congresses, do not substantiate *de facto* control over export activities. Additionally, as described above, just because Mr. Wei Fang previously held government positions with limited authority, record evidence does not support a finding that such activity amount to *de facto* control over export activities during the POR. Therefore, consistent with *Solar Cells PRC*, we find an absence of *de facto* government control with respect to the export activities of both the Fangda Group and Xuzhou Jianglong.

Comment 2: Whether Xuzhou Jianglong's Sale is *Bona Fide*

The petitioners urge the Department to find, for various reasons, that Xuzhou Jianglong's sole reported U.S. sale is not a *bona fide* transaction and argue that, in accordance with the Department's precedent, it cannot calculate a final separate rate for Xuzhou Jianglong.⁸⁸

Department's Position: The petitioners rely on *2013-2014 Glycine from PRC*, where we determined that a mandatory respondent's sales were not *bona fide*. In this case, however, Xuzhou Jianglong is participating as a non-selected separate rate applicant. It is not the Department's practice to perform a *bona fides* analysis on sales made by separate rate applicants that are not mandatory respondents.⁸⁹ Instead, as we explained in *Solar Cells PRC AR*,⁹⁰ we rely

⁸⁶ *Id.*

⁸⁷ See Xuzhou Jianglong Business Proprietary Memo at 2 for a discussion of related business proprietary information.

⁸⁸ See the petitioners' Case Brief at 15(citing *Glycine From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent To Rescind, in Part; 2013-2014*, 80 FR 18814 (April 8, 2015) (*2013-2014 Glycine from PRC*) and the accompanying Preliminary Decision Memorandum at page 5 (quoting *Tianjin Tiancheng Pharmaceutical Co. v. United States*, 366 F. Supp. 2d 1246, 1250 (CIT 2005) (*TTPC*)).

⁸⁹ See, e.g., *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of*

upon the U.S. Customs and Border Protection (CBP) data and/or CBP entry documentation to determine if the separate rate applicant had suspended entries during the POR. If there is record evidence of suspended entries, then we consider whether the documentation provided by the separate rate applicant establishes that it is entitled to a separate rate. Because the record demonstrates that Xuzhou Jianglong had a suspended entry during the POR, and we are satisfied with the other information demonstrating an absence of *de jure* and *de facto* government control, we preliminarily granted a separate rate status to this company. We continue to do so in the final results of this review.

Comment 3: Consumption of Needle Coke (Fangda Group and Fushin Jinly)

The petitioners argue that the Department should apply total adverse facts available (AFA) to the Fangda Group and Fushun Jinly in the final results, because their reported consumption of needle coke conflicts with record evidence and demonstrates the understatement of consumption of this input. The petitioners contend that the Department must resort to a facts available analysis, because the record is void of information necessary to resolve the conflict between the respondents' reported consumption of needle coke and their customers' product requirements, including needle coke content and the power level of SDGEs. The petitioners contend an adverse inference is warranted because neither respondent has cooperated to the best of its ability in providing the Department with accurate factors of production (FOP) information.

The petitioners present the following arguments:

A. Conflicting Data on the Record

- The purchase orders issued by the ultimate U.S. distributor of SDGEs in the United States (Company A)⁹¹ (*i.e.*, the downstream U.S. customer of the respondents' reported U.S. customers) unambiguously stipulate the required ranges (in percentage terms) for needle coke content, in addition to electrical and mechanical properties, for the specific SDGEs

Antidumping Duty Administrative Review; 2012-2013, 80 FR 20197 (April 15, 2015) at Comment 3 (“In light of the Department’s resource constraints and decision to limit individual examination of exporters under review, the Department’s practice is not to perform a resource-intensive and complex bona fides analysis on sales made by separate rate applicants that are not mandatory respondents. Rather, we rely upon CBP data and/or CBP entry documentation to determine if the separate rate applicant had suspended entries during the POR (as we did in this case).”). The exception to this practice is when we know from a concurrent new shipper review conducted of the relevant exporter that the exporter’s sale is not *bona fide*. In that situation, we will find that the same sale, covered by the administrative review, is not *bona fide*. See *Fresh Garlic From the People’s Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014) (not granting separate rate to Shijiazhuang Goodman Trading Co., Ltd.).

⁹⁰ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2013-2014*, 80 FR 80746, December 28, 2015, and the accompanying Preliminary Decision Memorandum at page 12, FN 42 (unchanged in *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2013-2014*, 81 FR 39905 (June 20, 2016) (*Solar Cells PRC AR*)).

⁹¹ We are not disclosing the identity of the company in question because the Fangda Group and Fushun Jinly claimed business proprietary treatment of this information.

ordered – the needle coke content and the technical requirements for ordered SDGEs were not stated in the alternative in the purchase orders (these elements were separate and distinct requirements). The Fangda Group and Fushun Jinly both reported consumption of needle coke that is inconsistent with the amounts specified in Company A’s purchase orders.

- Notwithstanding Company A’s (indirect) orders for High Power (HP) and Super High Power (SHP) electrodes from Fushun Jinly or for HP electrodes from the Fangda Group, the needle coke content requirements and the technical properties (*i.e.*, bulk density and electrical resistance) listed in the purchase orders were characteristic (based on the respondents’ own specifications) of electrode power levels higher than those specified in the product matching control number (CONNUM). In addition, even though the Fangda Group sold only Ultra High Power (UHP) electrodes to a certain U.S. customer during the POR (Customer B),⁹² as ordered by the U.S. customer in question, the Fangda Group reported lower power levels of electrodes for a number of sales made to this customer in its U.S. sales database. Reporting lower power levels for SDGEs that meet higher power level characteristics is conducive to the respondents’ claim that they did not use needle coke in the amounts contractually required by their customers.

B.1. Record Evidence does not Support Respondents’ Claims of Intentional Lack of Adherence to Customers’ Desired Needle Coke Requirements

- The Fangda Group’s explanation that the CONNUM was reported on the basis of the actual power level of the electrodes, as reflected in the producing entity’s test certificate, rather than the power level indicated in the purchase order or the commercial invoice of the selling entity, is directly contradicted by the Fangda Group’s own sale and accounting records. For example, concerning U.S. observation 18 (the U.S. sale made to Company B and reported as an HP electrode), the documentation collected at verification demonstrates that the U.S. customer ordered UHP electrodes, that electrodes met the Fangda Group’s specification requirements for UHP electrodes, that electrodes were invoiced, packed, and exported as UHP electrodes, and that the electrodes were described as UHP in the accounting sub-ledger – none of these records support the Fangda Group’s claim that it shipped HP rather than UHP electrodes.
- There is no record evidence showing that the respondents’ customers in question permitted either respondent to substitute their own raw material recipes and production techniques for the needle coke requirements and power levels that were explicitly set forth in the purchase orders. In other words, there is no record evidence that the respondents’ customers in question agreed to accept SDGEs that did not strictly adhere to the raw material requirements of the purchase orders. Absent such evidence, the Department must assume that the respondents, in fact, consumed the quantity of needle coke stipulated by the purchase orders and, thus, have underreported it to the Department.

B.2. Respondents’ Claim that Customer’s Stipulated Needle Coke Requirements are not Necessary for the Production of Certain Power Levels of SDGEs is Not

⁹² We are not disclosing the identity of the company in question because the Fangda Group claimed business proprietary treatment of this information.

Supported by Record Evidence

- The respondents' explanation that the higher power levels of electrodes can be achieved by subjecting the formed semi-finished product to undergo certain dedicated and proprietary production techniques, *in lieu* of incorporating requested levels of needle coke, is not supported by a technical understanding of the production and performance of SDGEs. While power level, bulk density, and electrical resistivity are important factors in the customer's purchasing requirements, the rate of SDGEs consumption in the electric arc furnace is also very important – these factors are all influenced by the use of needle coke.
- SDGEs are produced to meet end-users' needs for a particular furnace application, and the final properties of SDGEs must match these unique performance requirements, including consumption rate, for that furnace. As evident from descriptors of how a specific power level of SDGEs is defined (in the questionnaires issued to the respondents), an SDGEs power level is a function, in large part, of the raw material inputs used, in addition to the manufacturing process (and not the manufacturing process alone or the technical properties of SDGEs).
- The critical nature of raw material inputs to the production of SDGEs is demonstrated in Company A's purchase order requirements, which did not merely state the ordered product's power level, electrical conductivity, and bulk density, but specifically identified the product's needle coke content range.
- The importance of Company A specifying certain needle coke requirements for purchases made from the Fangda Group and Fushun Jinly is evidenced by comparison to other U.S. customers' purchase orders (which only specified product's power level, electrical conductivity, and bulk density, but not needle coke content). Thus, while the respondents' claim of using proprietary raw material recipes and production techniques may apply to the latter set of customers, the respondents did not have that same kind of autonomy with respect to Company A's specific raw material requirements.
- Raw materials dictate the final mechanical and electrical properties of SDGEs, as well as the performance of SDGEs, including the consumption rate. For Fushun Jinly's reported sales observations 51 and 68, which the Department verified, the test results in the inspection report qualify the electrode nipples at a power level lower (on the basis of Thermal Expansion Coefficient (CTE) requirement in Fushun Jinly's specifications) than what the customer ordered. Such a discrepancy undermines the Department's ability to verify that Fushun Jinly is delivering products at the power levels requested by its customers.

C. The Department Should Apply AFA to the Respondents' Sales to Company A and Customer B.

- The respondents' stated explanations concerning the reported levels of needle coke conflict with the technical nature of the product. Further, neither the Fangda Group nor Fushun Jinly met the contractually established needle coke content ranges, and the power level requirements, set forth in the purchase orders (that were presumably created in the ordinary course of business and not solely for purposes of this review by a known and repeat U.S. distributor of SDGEs, Company A).

- Similar to the situation in *Honey from PRC*,⁹³ the Department must reach the same conclusion here and reject the respondents' self-serving statements made for purposes of this case.⁹⁴
- Because the information on the record is not reliable, the Department must apply facts available in reaching the final results, pursuant to section 776(a) of the Act. Further, because neither the Fangda Group nor Fushun Jinly has cooperated to the best of its ability in providing the Department with accurate FOP information (concerning sales to Company A) and the Fangda Group has not cooperated to the best of its ability in reporting to the Department the accurate power level information (concerning its sales to Customer B), an adverse inference is appropriate under section 776(b) of the Act.
- Alternatively, the Department may apply partial AFA: based on the requirement for specific needle coke content found in each of Company A's respective purchase order, the Department should substitute the required range of needle coke content as an FOP for each product sold to Company A, and reduce the calcined petroleum coke content reported by the respondents, accordingly.

The respondents present the following arguments:

A. There Is No Legal or Factual Basis for the Application of Total AFA

- Contrary to the petitioners' assertions, on the basis of the statutory guidelines provided in sections 776(a)(2) and 776(b) of the Act, there is no factual or legal basis for the application of total AFA in this proceeding. All of Fushun Jinly's and the Fangda Group's responses to the Department's requests for information were made on a timely basis; the companies did not impede the proceeding in any manner; and the Department conducted week-long verifications of each respondent, which did not yield any discrepancy between the information provided to the Department and the Department's observations at verification. Given both companies' complete and total cooperation with the Department throughout this segment of the proceeding, there is no basis for a finding that either company did not act to the best of its ability or failed to cooperate with the Department at any point in this administrative review.

B. Respondents Correctly Reported FOPs on The Basis of Actual Consumption of Raw Materials Used to Produce the Merchandise under Consideration

- The petitioners' assertions, that the respondents were required to report the FOPs according to the needle coke content that was indicated in the purchase orders of Company A, are contrary to the record evidence in this case. In response to the

⁹³ See petitioners' Case Brief at 43 (citing *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 70 FR 38872 (July 6, 2005) (*Honey from PRC*) and the accompanying Issues and Decision Memorandum at Comment 8, *aff'd Shanghai Eswell Enter.Co. v. United States*, 32 CIT 1233, 1247-50 (CIT 2008)).

⁹⁴ *Id.*, at 44 (citing *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 34083 (June 13, 2005) and the accompanying Issues and Decision Memorandum at pages 60-61).

Department's inquiries, prompted by the petitioners' comments concerning the reporting of needle coke, the companies responded to the Department that the submitted FOPs were reported based upon the actual consumption of raw material inputs and not based upon needle coke levels corresponding with certain purchase orders. This is the same manner in which both companies reported their FOPs in previous administrative review segments under this order.

- For all reported U.S. sales, Fushun Jinly and the Fangda Group supplied their customers with SDGEs that met the power level specified by their customers in the purchase orders; the SDGEs were manufactured in accordance with each of the producing entity's own recipes and production techniques; the SDGEs sold by Fushun Jinly and the Fangda Group were accompanied by certificates of quality (the parameters of which included the power level, diameter, length, weight, bulk density and electrical resistance); and the Department verified each of the quality certificates contained in the selected sales traces and tested the outcomes of the technical properties against the respective producer's specification set forth in the respective company's product brochures - no discrepancies were found at verification.
- Fushun Jinly and the Fangda Group point to each of their respective explanations on the record detailing how each company is able to manufacture SDGEs that meet the technical properties applicable to customer's ordered power levels of SDGEs, without adhering to the needle coke content specified in a certain customer's purchase orders. Further, different SDGEs producers, including Fushun Jinly and the Fangda Group, have diverse recipes and production techniques to achieve the requisite power level of SDGEs, and the desired technical properties thereof. Even among the Fangda Group companies, the amount and type of needle coke used varies among individual producers.
- The level of needle coke is not the decisive factor for the consumption rate of an electrode. The consumption rate of a finished electrode is not a physical characteristic or a physiochemical standard – rather, it is an indicator of cost control that can only be quantitated accurately by the end user of the electrode. The consumption rate of an electrode is determined most significantly by the end users' operations in steel/metallurgy production and is dependent upon a series of the following comprehensive factors: furnace condition, type of steelmaking, the electric current used, furnace temperature, functioning time, the category and quantity of annexing agents added, the operation methodology of the steel workers, as well as the required steel output. Accordingly, it is unrealistic for producers of SDGEs to measure or control the actual consumption rate of SDGEs experienced by an individual end user.
- Despite the petitioners' unsubstantiated claim, raw material inputs are not the sole determinant of an electrode's properties - a company's proprietary production techniques will also impact an electrode's properties. To this end, the petitioners conceded that the proprietary production techniques employed by the companies (as detailed in the record) resulted in the improvement of the technical properties of SDGEs.
- The respondents did not underreport needle coke inputs, because the FOPs reported by the companies correctly reflected the actual amounts of needle coke incorporated into the production of each specific SDGE product.

C. The Department Verified the Accuracy of Respondents' Reported FOPs

- Concerning Fushun Jinly:
 - For July 2014, the Department verified all reported per-unit consumption amounts of raw material inputs (including needle coke, where applicable), and semi-finished products for each production process, from the forming stage to the graphitization.
 - The Department confirmed the overall accuracy of the FOP data reported by Fushun Jinly by reconciling the aggregated cost data in Jinly's monthly cost sub-ledgers (including the raw material costs ledgers) to the cost of goods sold (COGS) reported in the company's financial statements.
 - For July 2014, the Department traced the consumption costs of respective raw material inputs to the machining production stage for HP electrodes and UHP pins.
 - The Department requested, and the company provided, an explanation of how it is able to produce higher power levels of electrodes made from normal power formed semi-finished products using the type of coke inputs reported. The Department requested and obtained the test report performed in the ordinary course of business concerning the company's purchase of domestic needle coke (tested in July 2014), as well as the test reports performed in the ordinary course of business concerning self-produced calcined petroleum coke in June, July, and August 2014; an analysis of these reports confirms the company's claim that its incorporation of high quality raw petroleum coke results in a calcined petroleum coke product that shares certain physical and chemical characteristics of the needle coke sourced domestically. At verification, the Department undertook its own analysis of the test reports, noting that comparisons of volatile content, carbon content, and density reveal that self-calcined petroleum coke was comparable in quality to the purchased domestic needle coke.
- Concerning the Fangda Group:
 - The Department confirmed the accuracy of the Fangda Group's reported FOPs by reconciling consumption quantities of raw material inputs (including needle coke) and production output of semi-finished products with company records.
 - The Department confirmed the overall accuracy of Fangda Carbon's reported FOPs by reconciling the total costs of manufacture (COM) reported in COM worksheets, previously provided to the Department, to the COGS value in the company's audited financial statements. Specifically, the Department was able to tie reported raw materials consumption (including needle coke) to warehouse withdrawal records.
 - The Department was able to tie Fangda Carbon's reported raw material consumption for one month to transaction-specific source documentation and company sub-ledgers.
- There is no basis for the petitioners' allegation that there is no record evidence that the respondent's customers agreed to accept subject merchandise that did not meet the stated needle coke content set forth in certain of the customers' purchase orders. The administrative record establishes that the U.S. customers of both respondents, without exception, accepted the subject merchandise exported by the companies, and that, without exception, both companies received full payment from their U.S customers.
 - In their questionnaire responses, both companies reported that there were no returns or billing adjustments associated with their reported U.S. sales. During the verification of both companies' respective sales reconciliations, the Department confirmed that the finished goods inventory sub-ledgers had no

record of any returned goods. The Department also verified that there were no billing adjustments made.

- The ultimate evidence that both companies' merchandise met the power level requirements of the U.S. customers, notwithstanding the needle coke content set forth in certain purchase orders is that, without exception, both companies received the full invoice value as payment, as the Department observed at the verification of each company.
- The petitioners' misguided allegation is based solely on the misconception that the companies were required to base their FOPs using the needle coke content stated in certain purchase orders, instead of the actual needle coke that was used to produce the subject merchandise - at no point during the review did the Department request that the respondents revise their reporting of FOPs in such a manner. Indeed, following the petitioners' demand is contrary to the manner in which the respondents reported FOPs in all the previous segments of this proceeding, and contrary to the manner in which FOPs (in non-market economy cases) or production costs (in market economy cases) are currently calculated by the Department.
- The petitioners' assertion that the Department "must assume" that both companies used the amounts of needle coke as referenced in the purchase orders is contrary to the evidence in the administrative record and the Department's verification of the responses of each company.
 - Only the purchase orders of Company A contained the needle coke content requirement - other U.S. customers' purchase orders did not. If the petitioners' logic is followed, the reporting of FOPs by the companies, on the basis of needle coke content in the purchase orders of Company A, and their reporting of FOPs on the basis of actual needle coke consumption concerning all other U.S. customers would yield absurd results.
 - The Fangda Group clarified in its responses that Company A's needle coke content requirement is simply a boilerplate term contained in its purchase orders, indicative of its desire to have high quality electrodes at the stated power level. For example, one of Company A's purchase orders on the record actually provides for "1000% Needle Coke" – while this is an obvious error, it did not impact the company's acceptance of the order. The fact that neither the Fangda Group nor Company A corrected the erroneous needle coke content demonstrates that it is not a mandatory specification under the purchase order.
 - It is the qualified power level of SDGEs, and not the precise level of needle coke content, that concerns U.S. purchasers. That is why all U.S. customers specify the power level with respect to bulk density and electricity resistivity (which are the most pertinent technical properties of SDGEs), in their purchase orders, but only Company A includes a needle coke content level.

D. Respondents Reported the Correct Power Level for all of Their Respective U.S. Sales

- The respondents challenge the petitioners' assertion that they improperly reported sales of UHP electrodes as either HP or SHP electrodes in their U.S. sales databases in order to

facilitate the alleged under-reporting of needle coke in their FOP databases.

- Fushun Jinly only had sales of HP electrodes, SHP electrodes, and UHP pins during the POR - consequently it was not possible for it to have misreported any sales of UHP electrodes as sales of HP or SHP electrodes in the U.S. sales database. The Department verified the accuracy of the power levels that Fushun Jinly reported in its U.S. sales list.
- Of the two U.S. sales made by the Fangda Group to Customer B (that were ordered, invoiced, packed, and exported as UHP electrodes), one U.S. sale (observation 18) was reported in the U.S. database as an HP electrode and the other U.S. sale (observation 23) was reported in the U.S. database as an SHP electrode. For these transactions, the Department verified the reported power levels (*i.e.*, for observation 18 and 23, the inspection reports qualified the product as HP and SHP electrodes, respectively, under the producer's, *i.e.*, Chengdu Rongguang's, technical specification, but were sold by Fangda Carbon as UHP electrodes because they met the former exporting entity's, *i.e.*, Beijing Fangda's, technical requirements for UHP electrodes and, thus, were sold under Beijing Fangda's technical specification).
- Contrary to the petitioners' assertions, for these two verified sales made by the Fangda Group to Customer B, the producer's, Chengdu Rongguang's, warehouse-out slips and main operation revenue sub-ledgers clearly showed that the merchandise withdrawn from inventory and sold by Fangda Carbon were HP and SHP electrodes, respectively.
- As demonstrated on the record, the parameters for various mechanical/electrical properties for SDGEs at each power level differ considerably among the technical specifications maintained by the various companies within the Fangda Group, as well as its customers; similarly, the parameters for various mechanical/electrical properties in each unique technical specification for SDGEs overlap across the various power levels.
- The ultimate evidence, that both respondents' SDGEs met the technical requirements of a given power level as set forth in their U.S. customers' purchase orders, is that both companies received the payment in full for the SDGEs they sold, and there were no returns. The Department verified this to be the case.
- The petitioners' assertion that the respondents misreported the power levels of their U.S. sales is without merit. The administrative record establishes that both respondents correctly reported the power levels of all electrode products in their respective U.S. sales databases; further, the Department verified the completeness and accuracy of each of the respondent's U.S. sales databases, including the reported power level.

Department's Position: We find that the record evidence does not support the petitioners' allegation that the respondents failed to cooperate by not acting to the best of their ability by under-reporting the consumption of needle coke. Accordingly, we find that application of AFA with respect to this input of production is not warranted.

Section 776(a) of the Act provides that, subject to section 782(d) of the Act, the Department shall apply "facts otherwise available" if: (1) necessary information is not on the record, or (2) an

interested 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 the Department determines 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, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Section 776(b) of the Act further provides that the Department 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.

As the record shows, both Fushun Jinly and the Fangda Group fully cooperated with all of the Department's requests for information. Accordingly, application of AFA, as suggested by the petitioners, is not warranted. Furthermore, an application of facts available, pursuant to section 776(a) of the Act, is not warranted. At no time during the proceeding did the Department require either Fushun Jinly or the Fangda Group to structure their reporting of FOPs on the basis of the content requirements for needle coke found in the purchase orders of a U.S. distributor of SDGEs. Accordingly, we have no basis to find that either company withheld the information that we requested, under section 776(a)(2)(A) of the Act, or significantly impeded the proceeding, under section 776(a)(2)(C) of the Act. Moreover, we conducted exhaustive sales and FOP verifications of each company, and did not find any discrepancy between the information provided to the Department and our observations at the verifications. Also, there is no basis for a finding that the information Fushun Jinly and the Fangda Group provided to the Department in this review could not be verified (as provided by section 782(i) of the Act), under section 776(a)(2)(D) of the Act. For these reasons, we find that all the necessary information is on the record to calculate dumping margins with respect to Fushun Jinly and the Fangda Group.

In this review, both respondents reported that their respective FOPs were structured on the basis of actual consumption of raw material inputs, including needle coke, in the production of specific SDGEs products, and were not based on the needle coke levels designated in Company A's purchase orders.⁹⁵ Further, both companies provided explanations that they manufacture SDGEs that meet the technical requirements applicable to specific power levels as ordered by their U.S. customers (without regard to the needle coke levels stipulated in Company A's purchase orders), using the producing company's own raw materials recipes and dedicated proprietary production techniques. According to Fushun Jinly:

⁹⁵ See Fushun Jinly's December 11, 2015, supplemental questionnaire response (FJ – 2ndSQR2) at page 9, and the Fangda Group's December 30, 2015, supplemental questionnaire response (FG – 3rdSQR) at pages 2 through 5.

It is important to recognize that Fushun Jinly's electrode products meet the requirement{s} of specifications and the relevant physical and chemical standards of the corresponding power levels. In addition, all of Fushun Jinly's products comply with customers' requests for electrode specifications such as electrical conductivity and bulk density. Producers such as Fushun Jinly have the right to develop {their} own recipes and production techniques. The products Fushun Jinly produces are undoubtedly acceptable and qualified and meet all specified standards. Fushun Jinly always provides customers with satisfactory qualified electrodes along with quality inspection reports. What end users care most {about} are the ultimate properties of the electrodes rather than the raw materials consumed in producing those electrodes. Fushun Jinly believes none of Chinese manufacturers produce electrodes strictly in according to such raw material requirements, but produce electrodes that comply with the specifications of the stated power levels.⁹⁶

According to the Fangda Group:

With regard to the needle coke requirements that may be set forth in a purchase order for a given electrode specification, it is impractical for Fangda or any producer to produce electrodes that contain such strict raw material levels. The reasons are as follows:

First, producers, purchasers and ultimate end users are most concerned that the electrodes meet the ultimate power-level specifications. The raw material composition of the electrode is not part of the electrode power level specifications. Fangda produces different grade of electrodes according to different recipes. As long as the finished products meet the specification requirements of the corresponding power level, Fangda has the right to develop its recipes and production techniques in a manner that reduces cost and increases profitability. Even among the Fangda Companies, each of the electrodes producers has their own unique procedures or processes with respect to material inputs, production process and equipment for producing products to a specified power level... Fangda companies produce electrodes that comply with the power level specifications in accordance with their own recipes and their own manufacturing techniques.

Second, the electrodes produced in accordance with Fangda's recipes and production techniques absolutely meet the stated power-level specifications to the satisfaction of both the purchasers and the ultimate end users... The graphite electrodes were produced by the Fangda companies in accordance with their own recipes and techniques, without regard to the raw material levels set forth in the purchase orders. The electrodes produced met the stated power-level specifications and functioned well in end users' furnaces at all times.⁹⁷

Further, when questioned by the Department, Fushun Jinly provided a technical discussion on

⁹⁶ See FJ – 2ndSQR2 at page 9.

⁹⁷ See FG – 3rdSQR at pages 3 through 4.

the record explaining how it is able to manufacture SDGEs that meet the technical requirements of higher power levels, with the needle coke levels incommensurate with those stated in Company A's purchase orders.⁹⁸ Notably, Fushun Jinly explained that its dedicated proprietary production techniques are able to achieve significant improvements in the mechanical and electrical properties of a finished product (*i.e.*, upgrade the product's power level):

The input of raw materials is not the only determinant of an electrode's final properties. Production technique and process can also strongly affect the properties of electrodes such as electrical conductivity, bulk density, bending strength, elastic modulus as well as thermal expansion. Among these, electrical conductivity and bulk density are the most important physical and chemical indicators, while thermal expansion is comparatively less significant. That is why almost all electrodes purchasers put the requirements of bulk density and electrical resistance instead of thermal expansion into the purchase orders.

Undoubtedly, and as agreed by the petitioners, *{the company's specific proprietary production techniques}* will improve the physical properties of electrodes. Specifically, the bulk density and electrical conductivity of the electrodes are improved... If the bulk density and electrical conductivity as well as other indicators reach a higher power level standard, then the electrode can be sold as a higher level electrode product. Thus *{the company's specific proprietary production techniques}* can upgrade the power level of electrodes.

Admittedly, the thermal expansion coefficient, or CTE, will become higher... However, the increased CTE of electrodes... is still within the scope of thermal expansion standards for each power level of electrodes. To justify our argument, Fushun Jinly technicians conducted thermal expansion tests on the NP electrodes, HP electrodes and SHP electrodes produced with its recipes and technology. Please refer to Appendix S2-17...

As far as the thermal expansion is concerned, Fushun Jinly's products are always within the scope of thermal expansion standards for each power level of electrodes.⁹⁹

Of importance is the fact that Fushun Jinly acknowledged that SDGE products that incorporate needle coke have a slightly lower consumption rate in electric arc furnaces operated under large electrical currents.¹⁰⁰ The following explanation that Fushun Jinly provided, however, demonstrates that the reason the company abstains from consuming otherwise pre-requisite levels of expensive needle coke (at the slight compromise of the consumption rate of finished SDGEs at any given power level being produced) is because it obtains key processing cost advantages:

⁹⁸ See FJ – 2ndSQR2 at pages 6 through 8. We withhold the specifics of Fushun Jinly's described production techniques, because the discussion contains extensive use of business proprietary information for which Fushun Jinly claimed business proprietary treatment.

⁹⁹ *Id.* (the italicized information in curly brackets identifies business proprietary information that was re-stated in a public form).

¹⁰⁰ *Id.*, at 8.

It is a common practice to use some needle coke as raw material to produce higher power electrodes because needle coke is a coke of higher quality and may be used to produce high quality products *{instead of the company's specific proprietary production techniques}*. To reduce processing costs with respect to certain types of products, Jinly has produced HP and SHP electrodes *{using the company's specific proprietary production techniques}*.

The raw petroleum coke consumed by Fushun Jinly is produced by the nearby *{petrochemical company}*, whose petroleum coke is commonly recognized as of the best quality coke in China. Moreover, Fushun Jinly usually selects raw petroleum coke of the highest grade from this coke producer and the selected raw petroleum coke shares some properties of needle coke such as low sulfur and low ash content. *{The use of company's specific proprietary production techniques}* increased the cost of the electrodes processing, but was less costly than *{u}sing* needle coke. Regardless of whether Fushun Jinly uses more needle coke, *{or utilizes its specific proprietary production techniques}*, as long as the electrodes meet the standard of a certain power level, they are qualified as products of that power level.¹⁰¹

Importantly, this discussion also demonstrates that Fushun Jinly is able to produce higher power level SDGEs, not only because of the dedicated proprietary production techniques that it claimed to employ in the normal course of business, but also because it uses the highest quality of raw petroleum coke available.

The explanation that Fushun Jinly offered is echoed in the statements by the Fangda Group:

The four manufacturers have developed their unique recipes and techniques through years of experiment and experience. With appropriate quality calcined petroleum coke and some needle coke incorporated when necessary, Fangda could produce satisfactory qualified electrode products.¹⁰²

As discussed further below, we confirmed at verification Fushun Jinly's assertion that the calcined petroleum coke it obtained from processing purchased high quality petroleum coke provides for properties comparable to those of purchased domestic needle coke. The petitioners' comments stress the importance of needle coke as the factor that predominantly dictates the final technical properties of SDGEs, as evidenced by the performance characteristics of SDGEs in the furnace. The petitioners, however, did not disprove that the calcined petroleum coke (processed from high quality raw petroleum coke) can act as an acceptable substitute for pre-requisite levels of needle coke, in the environment where the companies' dedicated proprietary production techniques are purposely imposed on the formed semi-finished product (that was extruded using such calcined coke as a primary raw material input) to achieve the desired technical properties of SDGEs. Therefore, the companies' assertion that SDGEs with less than optimal levels of needle

¹⁰¹ *Id.* (the italicized information in curly brackets identifies business proprietary information that was re-stated in a public form).

¹⁰² See FG – 3rdSQR at 8.

coke are compromised only in terms of the consumption rate (*i.e.*, quality, in essence), and not in terms of power level or technical properties thereof, is not contradicted by information the petitioners have submitted on the record as to their own technical understanding concerning the performance of SDGEs in specific furnace environments.¹⁰³ In other words, there is nothing on the record of this review that suggests that high quality raw petroleum coke, coupled with the respondents' dedicated proprietary production techniques, are incapable of achieving the technical properties of higher power levels of SDGEs similar to SDGEs manufactured with needle coke alone (and without the additional production processes utilized by the respondents). In fact, as demonstrated by the discussion of the information we verified, below, the record reflects the opposite. Notwithstanding this, because the consumption rate of SDGEs is not an electrical or mechanical property but, rather, a measure of an end user's cost control, it does not factor into the physical characteristics of SDGEs that we consider for purposes of our dumping margin analysis.

Having found the respondents' explanations on the record concerning the reporting of needle coke reasonable, subject to verification, we did not require either Fushun Jinly or the Fangda Group to structure its FOP reporting on the basis of needle coke content requirements found in the purchase orders of a U.S. distributor of SDGEs (*i.e.*, Company A). As a preliminary matter, the first sales to the United States under review (that form the basis for establishing the U.S. prices under the statute) were made by Fushun Jinly and the Fangda Group to certain unaffiliated U.S. customers, and not to Company A (*i.e.*, certain of these unaffiliated U.S. customers subsequently resold the product procured from both respondents to Company A). The record demonstrates, and the petitioners confirm, that none of the purchase orders from the unaffiliated U.S. customers of both the Fangda Group and Fushun Jinly specified needle coke content, only the product's power level and, often, certain specific technical properties, specifically, electrical resistivity and bulk density.¹⁰⁴ Therefore, it is not appropriate to rely on information outside the realm of what concerns the first reported sale to an unaffiliated U.S. customer (that forms the basis for the Department's calculation of the weighted-average dumping margins) as a basis to assess the validity of the FOPs reported for that sale. More importantly, absent concrete evidence that either company under-reported needle coke, requiring that Fushun Jinly and the Fangda Group structure their FOP reporting on the basis of stipulated needle coke requirements in the purchase orders, when such requirements are not followed in the normal course of business, as is the case here, would result in imputing the consumption of needle coke that does not exist in companies' books and records. Such an outcome undermines our obligation to calculate the dumping margins as accurately as possible, because it is not reflective of the examined companies' practices that underlie their pricing behavior that we examine in the

¹⁰³ See, *e.g.*, the petitioners' December 21, 2015, submission, "6th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China - Petitioners' Pre-Verification Comments," at Attachment I.

¹⁰⁴ See, *e.g.*, the FG – AQR at Appendix A-5, the FG – SACQR, at Appendices S1-12 to S1-15, and Fangda Group Verification Report at Verification Exhibits 11 through 19; Fushun Jinly's Section A questionnaire response, dated June 15, 2015 (FJ– AQR) at Appendix A-5, Fushun Jinly's supplemental questionnaire response dated October 6, 2015 (FJ – 1stSQR2), at Appendices S1-A-6 to S1-A-9, S1-A-16, S1-A-19, and S1-A-27, and Memorandum to File, "Verification of the Questionnaire Responses of Fushun Jinly Petrochemical Carbon Co., Ltd., in the Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China," dated February 1, 2016 (Fushun Jinly Verification Report) at Verification Exhibits 8 through 15.

review.

On the basis of the information that we verified, as discussed below, we disagree with the petitioners' assertion that the needle coke content requirements and the technical properties (*i.e.*, bulk density and electrical resistance) listed in Company A's purchase orders were characteristic (based on respondents' own specifications) of electrode power levels higher than those specified in the CONNUM by each respondent.

First, the SDGEs sold by Fushun Jinly and the Fangda Group were accompanied by inspection reports that, by reference to the appropriate technical specification, demonstrate that each company supplied to its U.S. customers SDGEs with the power levels as specified by the customers in the purchase orders. Although certain of the technical properties stated in the purchase orders, mainly bulk density and electrical resistance, may be characteristic of higher power SDGEs, we verified that, in order to qualify a product at a specific power level, all six electrical/mechanical requirements, recorded in the inspection report (*i.e.*, bulk density, electrical resistance, flexural strength, modulus of elasticity, ash content, and CTE), must be met, per the respective company's technical specification.

Second, the petitioners' assertion is misleading, when viewed in the context of individual technical properties in isolation, because the concept of what constitutes a specific power level under these circumstances is somewhat fluid. Specifically, as demonstrated on the record, the parameters for various mechanical/electrical properties in Fushun Jinly's and the Fangda Group's respective technical specification(s) for SDGEs overlap across the various power levels; further, the parameters for various mechanical/electrical properties for SDGEs at each power level differ considerably among the technical specifications maintained by the various companies within the Fangda Group.¹⁰⁵ This circumstance exists because all the technical properties' parameters are expressed in terms of "minimum" or "maximum," and for certain technical properties, the required values are the same across certain power levels of electrodes and pins.¹⁰⁶ Accordingly, the respondents' contention that it is possible that electrodes meeting certain technical properties for UHP electrodes can only be sold as SHP or HP electrodes, is valid.¹⁰⁷

With the exception of certain U.S. sales that the Fangda Group made to Customer B, both Fushun Jinly and the Fangda Group structured the CONNUMs and FOP reporting on the basis of power level requirements set forth in their U.S. customers' purchase orders, as produced and invoiced to the U.S. customers.¹⁰⁸ While the petitioners are correct that the Fangda Group only sold UHP electrodes to Customer B, as ordered, the Fangda Group reported either HP or SHP power levels for certain sales made to this customer.¹⁰⁹ The record demonstrates, however, why the power levels were reported this way. Specifically, for two of the U.S. sales that we verified

¹⁰⁵ See FJ – 1stSQR2 at Appendix S1-A-30 (for Fushun Jinly's product brochure), and FG – AQR at Appendix A-13 (for product brochures of Fangda Carbon, Fushun Carbon, Chengdu Rongguang, and Hefei Carbon).

¹⁰⁶ See also, FG – 3rdSQR at 2-3 (demonstrating, using its product brochures, how the bulk density with a certain value may be characteristic of either a SHP, HP, or HD electrode).

¹⁰⁷ See the respondents' Rebuttal Brief at 30.

¹⁰⁸ See, *e.g.*, Fushun Jinly Verification Report at 10-11 and Verification Exhibits 8-15 and the Fangda Group Verification Report at 12-13 and Verification Exhibits 11-19.

¹⁰⁹ See FG – SACQR at Appendix S1-30 and S1-36.

(i.e., observations 18 and 23), the inspection reports qualified the product as HP and SHP electrodes, respectively, under the producer's, Chengdu Rongguang's, technical specification. Fangda Carbon sold, however, these electrodes as UHP electrodes because they met Beijing Fangda's (i.e., the company formerly used as an exporting arm of the Fangda Group) technical requirements for UHP electrodes and, thus, were sold under this company's technical requirements. Concerning these examined sales that we verified, we observed the following:

For OBSU 23, Fangda Carbon sold UHP electrodes that were originally produced as SHP by Chengdu Rongguang. Chengdu Rongguang quality tested the product and passed the information to Fangda Carbon, which used its brand name on the quality test certificate. Chengdu Rongguang released from inventory SHP electrodes that met Beijing Fangda Carbon-Tech Co., Ltd.'s (Beijing Fangda) UHP product specification and were sold {to Customer B} as UHP electrodes under the Beijing Fangda specification. Beijing Fangda was the former exporter for the Fangda Group and Beijing Fangda is 100 percent owned by Fangda Carbon. Company officials explained that all sales to {Customer B} are {made} under the Beijing Fangda specifications, because this is the established business practice between {Customer B} and Fangda Carbon. Sales that once were handled by Beijing Fangda are now handled through the Export Department of Fangda Carbon. The Chengdu Rongguang SHP electrodes that were sold met the requirements of the Beijing Fangda specification for UHP.

Similarly for OBSU 18, another sale to {Customer B}, electrodes held in Chengdu Rongguang stock as HP (produced as Chengdu Rongguang HP) were sold as UHP electrodes under the Beijing Fangda specifications.

In both cases the electrodes did not meet the Chengdu Rongguang UHP specification with respect to Flexural Strength but did meet the balance of the other UHP physical properties under the specification. The Beijing Fangda UHP specification was not as stringent with respect to Flexural Strength as compared to the Chengdu Rongguang specification.¹¹⁰

Because the product, as produced by Chengdu Rongguang, was either HP or SHP electrodes, the Fangda Group structured the CONNUM and the FOP reporting accordingly, notwithstanding that the electrodes were sold as UHP. To this end, we find the petitioners' claim, that "none of Fangda's actual records kept in the ordinary course of business support Fangda's claim that it shipped an HP rather than UHP electrodes," without merit. For the aforementioned sales to Customer B, we verified that Chengdu Rongguang's warehouse-out slips and main operation revenue sub-ledgers clearly showed that the merchandise withdrawn from inventory and sold by Fangda Carbon were HP and SHP electrodes, respectively.¹¹¹ Moreover, the information we examined for the aforementioned sales made to Customer B corroborates the Fangda Group's assertion in the record that the parameters for technical properties for SDGEs at each power level differ among the technical specifications of the various companies within the Fangda Group.

¹¹⁰ See the Fangda Group Verification Report at 20-21 (the italicized information in curly brackets identifies business proprietary information that was re-stated in a public form), and Verification Exhibits 17 and 19.

¹¹¹ *Id.*, at Verification Exhibit 17 (pages 34-35) and Verification Exhibit 19 (pages 42-44).

The information the Department examined comprehensively at the verifications of Fushun Jinly's and the Fangda Group's sales and cost responses unequivocally dispute the petitioners' assertion that Fushun Jinly and the Fangda Group under-reported the consumption of needle coke, or improperly reported the power levels of SDGEs, as detailed below.

Fushun Jinly

We verified Fushun Jinly's reported per-unit consumption amount of raw material inputs (including needle coke inputs, where applicable) and semi-finished products in each of the production processes, from the forming stage to graphitization, as well as the output quantity of semi-finished and finished products at each stage of production.¹¹² For example:

For July 2014, we confirmed the reported consumption quantity of material inputs and/or semi-finished products and the output quantity for each production process, as reported in Tables A-1 through A-8 in Appendix S2-12, by examining journal vouchers, process-specific cost calculation sheets, warehouse-in and warehouse-out slips, and raw-materials and process-specific inventory sub-ledgers. *See Exhibit 20.*

For July 2014, we confirmed the reported consumption quantity of { } baked semi-finished products and the output quantity in the machining stage for {*specific size of*} HP electrodes, as reported in Table A-13 in Appendix S2-12, by examining warehouse-in (for machined product) and warehouse-out (for { } baked semi-finished product) slips. We tied the total consumption quantity of { } baked semi-finished products and the output quantity in the machining stage for all HP electrodes, as reported in Table A-13 in Appendix S2-12 to the machining cost-calculation sheets and respective inventory sub-ledgers. *See Exhibit 20.*

For July 2014, we confirmed the reported consumption quantity of { } baked UHP semi-finished products and the output quantity in the machining stage for {*specific size of*} UHP pins, as reported in Table A-16 in Appendix S2-12, by examining warehouse-in (for machined product) and warehouse-out (for { } baked UHP semi-finished product) slips. We tied the total consumption quantity of { } baked UHP semi-finished products and the output quantity in the machining stage for all UHP pins, as reported in Table A-16 in Appendix S2-12 to the machining cost-calculation sheet and respective inventory sub-ledgers. *See Exhibit 20.*¹¹³

Further, in the verification report, we detailed the procedures we undertook, and the supporting documentation we examined, with respect to tracing the consumption of raw materials for one POR month for HP electrodes and UHP pins – specifically, substantiating how the cost data contained in the company's raw materials sub-ledger trace (through all respective processes' cost

¹¹² *See Fushun Jinly Verification Report at pages 19-24.*

¹¹³ *Id.*, at 22-23 and Verification Exhibit 20 (the italicized information in curly brackets identifies business proprietary information that was re-stated in a public form; the blank information in curly brackets identifies business proprietary information that was redacted).

of production and semi-finished products inventory sub-ledgers) to the data contained in its machining cost of production/manufacture sub-ledger for these power levels of electrodes and pins.¹¹⁴ We confirmed the amount of all raw material inputs, including needle coke (where appropriate), that Fushun Jinly reported in the production of HP electrodes and UHP pins, as well as the specific production processes these products underwent, respectively.

Additionally, we confirmed the overall accuracy of the FOP data reported. In the verification report, we detailed the procedures we undertook and the supporting documentation we examined concerning the reconciliation of the aggregated cost data contained in the company's monthly machining cost of production/manufacture sub-ledgers to the data contained in the company's financial statements (*i.e.*, the COGS line item in the income statement account applicable during the POR).¹¹⁵ We concluded:

Using the aforementioned worksheets and source documents, we confirmed the accuracy of the reconciliation of the fiscal year total operating cost in the income statement to the sum of the cost values reflected in Fushun Jinly's monthly machining cost of production calculations sheets for the POR. We found no discrepancies. *See Exhibit 17.*¹¹⁶

At verification, we also requested that Fushun Jinly provide an explanation of how it is able to produce higher power levels of electrodes made from normal power (NP) formed semi-finished products without regard to the pre-requisite levels of needle coke. Fushun Jinly offered the following explanation:

There are two technical reasons why Jinly can produce HP graphite {electrodes through} {*a certain dedicated proprietary production process*} and produce SHP graphite electrode{s} {through} {*another dedicated proprietary production process*}. Needle coke is needed to produce UHP power level electrodes.

The first technical reason is that the high quality of the raw petroleum coke purchased by Jinly results in the production of calcined petroleum coke that has physical properties that are close to those of needle coke. The second technical {reason} is that certain important physical properties may {be significantly} and appreciably improved through {*the use of specific and dedicated proprietary production processes*}.

Both needle coke and calcined petroleum coke are produced using by-products derived from petroleum or oil refining production processes. Needle coke is produced as a product of an integrated calcining process using by-product generated at a more sophisticated refining facility. In contrast, calcined petroleum coke is produced by separately calcining raw petroleum coke. Nevertheless, some refining facilities are able to produce high quality raw petroleum coke that through calcining have physical properties that are close to those of needle coke. For example, the raw petroleum coke that is calcined by Jinly is produced by the {*nearby petrochemical company*}. {That facility}

¹¹⁴ *Id.*, at 19-21 and Verification Exhibits 18 and 19.

¹¹⁵ *Id.*, at 17-19, and Verification Exhibit 17.

¹¹⁶ *Id.*, at 19.

produces petroleum coke that is commonly recognized {as one} of the best quality coke in China. After calcining at Jinly, the calcined coke contains {*certain percentage*} of the needle shape structure {and shares} some properties of needle coke such as high density, low sulfur and low ash content.

Generally speaking, needle coke has a better aligned structure resulting in a high density, low electrical resistance, and low C.T.E. Calcined petroleum coke has a little bit lower grade of these physical properties. Notwithstanding, the high quality petroleum coke used by Jinly results in {a} calcined coke with most physical properties close to that of needle coke. Please see the attached lab reports of calcined coke produced by Jinly from raw petroleum coke {made} by the {*nearby petrochemical company*} and calcined coke produced by another calcining factory, from raw petroleum coke produced from another supplier of lower quality raw petroleum coke.

Moreover, the two most important physical properties that determine the power level of an electrode are bulk density and electrical resistance. While raw materials matter to the performance of the product, the production process or processing workmanship also matter to an equal extent. The baked product after forming through extrusion contains quite a bit of inner pores that are filled with gas or air. This is the major reason for the low density and the high electrical resistance of a regular {power electrode}. To improve the power level of the electrode, {*specific dedicated production techniques are imposed, whereby*}...the bulk density of the electrode is increased and the electrical resistance of the electrode is reduced. {*As a result of specific dedicated proprietary production techniques*}, a graphite electrode may meet the standards set for HD and HP electrodes. Likewise, {*as a result of additional dedicated proprietary production techniques*}, the bulk density is further increased and the electrical resistance is further reduced so that the graphite electrode may {then meet} the standards set for SHP electrodes.¹¹⁷

Having reviewed this explanation, we requested that Fushun Jinly provide test reports, performed in the ordinary course of business, for the purchased domestic needle coke (tested in July 2014) and self-produced calcined cokes for the months of June, July and August 2014. Our analysis of these reports did not discredit Fushun Jinly's claim that its incorporation of high quality raw petroleum coke results in a calcined petroleum coke product that shares certain physical and chemical characteristics of domestic needle coke:

Fushun Jinly provided a sales contract...issued by the supplier of needle coke, which made apparent the product's grain size distribution, and maximum values for ash content, sulfur content, volatiles content, and water content, as well as a minimum value for density, and a maximum value for CTE. Fushun Jinly also provided its test report...of this needle coke. Fushun Jinly explained it performs this test in the normal course of business prior to the requisition of raw materials from inventory for production. We observed that the values for chemical and mechanical properties in Fushun Jinly's test

¹¹⁷ *Id.*, at 24-25 and Verification Exhibit 27 (the italicized information in curly brackets identifies business proprietary information that was re-stated in a public form).

report were in the range for maximum or minimum requirements stipulated in the supplier's sale contract. Because we verified purchases of raw petroleum coke made in July 2014, we also requested Fushun Jinly to provide test reports for self-produced calcined petroleum coke for month of July 2014, and the month preceding and following July 2014 (*i.e.*, June 2014 and August 2014). Fushun Jinly provided the requested information. Across test reports for calcined petroleum coke for three months, we observed that the ash content for calcined petroleum coke was higher than the ash content for needle coke for all months; the volatile content for calcined petroleum coke was lower for one month and higher for two months than the volatile content for needle coke; the carbon content for calcined petroleum coke was lower for two months and higher for one month than the carbon content for needle coke...; the density for calcined petroleum coke was slightly lower for two months and lower for one month than the density for needle coke; and the sulfur content for calcined petroleum coke was higher than the sulfur content for needle coke for all three months. *See* Exhibit 27.¹¹⁸

We verified the accuracy of the reported power levels that Fushun Jinly reported in its U.S. sales list. We focused on confirming the power levels reported for electrodes (and not pins), given that: 1) the weight of pins accompanying the respective electrodes is miniscule, in relation to the weight of electrode, for any given U.S. sale and, more importantly, 2) the control numbers were constructed on the basis of the electrode power level only, in compliance with the instructions concerning the product characteristics established in the antidumping questionnaire. Upon reviewing eight complete sales traces (four pre-selected sales and four sales selected at verification), we concluded:

Fushun Jinly relied on the information contained in the purchase order, invoice, and packing list to report the power level, dimensional characteristics, and the type of connecting system... Using technical specifications Fushun Jinly maintained during the POR, Fushun Jinly demonstrated that, in order to qualify a product at a specific power level, all six electrical/mechanical properties must meet the lowest (or highest, where applicable) requirements for a given power level. Using the pre-selected and on-site selected U.S. transactions, we confirmed that the reported power level as stated in the sales documents are supported by the Inspection Report, the underlying Electrode Data Record and Nipple Data Record, and Fushun Jinly's technical specifications. *See* Exhibits 8 through 15.¹¹⁹

Fangda Group

We verified the Fangda Group's reported per-unit consumption amount of raw material inputs (including needle coke inputs, where applicable) and semi-finished products in each of the production processes, from the forming stage to graphitization, as well as the output quantity of semi-finished and finished products at each stage of production:

For June 2014, we confirmed the reported consumption quantity of material inputs and/or

¹¹⁸ *Id.*, at 24-25 and Verification Exhibit 27.

¹¹⁹ *Id.*, at 10-11 and Verification Exhibit 8 through 15.

semi-finished products and the output quantity for each production process, as reported in the Fangda Group's December 30, 2015, supplemental response at Appendix S3-18, by examining journal vouchers, process-specific cost calculation sheets, warehouse-in and warehouse-out slips, and raw-materials and process-specific inventory sub-ledgers. *See* Verification Exhibit 22 and 23. Company officials described the process of aggregating consumption by control numbers across the FOP buildup worksheets. We traced the reported consumption of several inputs from individual production line items down to the control number specific buildup during several production stages. We did not find any discrepancies.¹²⁰

Further, in the verification report we detailed the procedures we undertook for one POR month to verify how the cost data contained in the company's cost of production/manufacture sub-ledgers tie to the data contained in its financial statements and how the cost data contained in the company's materials sub-ledgers tied to the data contained in its cost of production/manufacture sub-ledgers.¹²¹

We also confirmed the overall accuracy of the FOP data reported by reconciling the total COM reported in the COM worksheets previously provided to the Department to the COGS value recorded in Fangda Carbon's audited financial statements. Notably, we also tied the reported consumption raw materials (including needle coke) to inventory records:

Raw materials items in the COM worksheet tied to the POR trial balance representing total warehouse withdrawals for the period. In the trial balance, imported needle coke aggregates entries from three separate imported needle coke inventory accounts, while metallurgical coke aggregates entries from four corresponding inventory accounts...For these two items, total quantities tie between the POR trial balance and the COM worksheet, and value ties based on a calculation of unit price by weight average. Consumption of calcined petroleum coke purchased from Fangda High and New, purchases of steam and coking coal, as well as water, tie to the inventory ledgers for the POR with respect to the total amount withdrawn from warehouse for the POR...All items on the COM worksheet tied to the respective sub-ledgers provided. We found no discrepancies. *See* Verification Exhibit 21.¹²²

We verified the accuracy of the reported power levels that the Fangda Group reported in its U.S. sales list, using both pre-selected and on-site selected transactions. We concluded:

Power level was determined by comparing company specifications to the six items enumerated in the quality certificate inspection report, as described below... In Fushun Carbon's product brochure, there are two standards listed for each specification, FC, and YB. Fushun Carbon produces and sells at the FC standard, which is stricter than the industry standard designated YB. Bulk density and resistance are the highest priority characteristics; however, a product must meet the requirements of all six characteristics

¹²⁰ *See* the Fangda Group Verification Report at 26-27 and Verification Exhibits 22 and 23.

¹²¹ *Id.*, at 25-26 and Verification Exhibit 23.

¹²² *Id.*, at 24-25 and Verification Exhibit 21.

to be graded at a specific power level. For OBSU 12, an HP electrode produced by Fushun Carbon, we compared the six items in the inspection report: Bulk Density, Resistance, Flexural Strength, Modulus of Elasticity, C.T.E., and Ash Content to the same six characteristics in the Fushun Carbon product brochure column FC for 250 to 400 mm diameter HP electrodes. We also compared the inspection report items to UHP characteristics on the same page of the brochure. The product failed Bulk Density and C.T.E with respect to the UHP specification but passed all six characteristics for HP and was, therefore, graded HP (but could not be graded as UHP).¹²³

Control Number (CONNUMU) – for power level, we tested the outcomes of the six quality properties against the individual manufacturer’s standard. We did not find any discrepancies.¹²⁴

Fushun Jinly and the Fangda Group

The petitioners assert that there is no record evidence that Fushun Jinly’s or the Fangda Group’s U.S. customers agreed to accept SDGEs that did not meet the stipulated needle coke content set forth in Company A’s purchase orders. The administrative record establishes, however, that the U.S. customers of Fushun Jinly and the Fangda Group accepted, without exception, the SDGEs exported by both companies, and paid for them in full. First, both companies reported that there were no returns of any merchandise.¹²⁵ During the respective sales and cost reconciliations of each company’s reported U.S. sales and FOPs, we did not observe that the records (*e.g.*, finished goods inventory ledger) for either company had entries for any returned goods.¹²⁶ Second, each company reported that there were no billing adjustments.¹²⁷ We verified that no billing adjustments were reflected in either of the company’s books and records.¹²⁸ Third, the respondents are correct that the ultimate evidence that their merchandise met the power level requirements of the ultimate customers, *e.g.*, Company A, notwithstanding the needle coke content set forth in certain purchase orders, is that, without exception, each company received the invoiced value as payment from its U.S. customers. In verifying the pre-selected and on-site selected sales traces, we confirmed for each company that “the invoiced sales value always agreed with the payment value.”¹²⁹ The record also reflects the full payments made by Company A to a certain U.S. customer of Fushun Jinly and the Fangda Group (that resold the SDGEs to Company A) for the exact amounts invoiced by the U.S. customer to Company A.¹³⁰

We find that the administrative record does not support the petitioners’ allegation that Fushun

¹²³ *Id.*, at 13 and Verification Exhibits 11 through 19.

¹²⁴ *Id.*, at 20-21 and Verification Exhibits 11 through 19.

¹²⁵ See Fushun Jinly’s June 30, 2015, questionnaire response (FJ – CDQR) at C-15; and FG – 3rdSQR at 5.

¹²⁶ See Fushun Jinly Verification Report at 12, 18-19, and Verification Exhibits 7 and 17; *see also* the Fangda Group Verification Report at 16-18, 24-26, and Verification Exhibits 20 and 21.

¹²⁷ See Fushun Jinly’s FJ – CDQR at C-16; and the Fangda Group’s June 22, 2015, questionnaire response at C-18.

¹²⁸ See Fushun Jinly Verification Report at 17; and the Fangda Group Verification Report at 22.

¹²⁹ See Fushun Jinly Verification Report at 17 and Verification Exhibits 8 through 15; and the Fangda Group Verification Report at 22 and Verification Exhibits 11 through 19.

¹³⁰ See FJ – 1stSQR2 at 6 and Appendix S1-A-7 and S1-A-8; and FG – SACQR at S1-10 and Appendix S1-13 and S1-14.

Jinly and the Fangda Group under-reported the consumption of needle coke or improperly reported power levels of SDGEs they sold to the United States during the POR.

Comment 4: Whether U.S. Sales are *Bona Fide* (Fangda Group and Fushun Jinly)

The petitioners contend that the Department should apply total AFA to Fushun Jinly and the Fangda Group because their reported U.S. sales are, for various reasons, not *bona fide*. The petitioners allege that the record in this review raises concerns regarding the *bona fide* nature of respondents' sales to all of their respective U.S. customers, issues that undermine the veracity, reliability, and completeness of the information provided by the respondents.

The respondents counter that there is no legal or factual basis to apply AFA under the circumstances of this case because both Fushun Jinly and the Fangda Group have been fully cooperative and the Department verified their responses as accurate. The respondents further claim that the petitioners' case brief simply rehashes comments previously submitted to the Department regarding the companies' initial questionnaire responses, without taking into account their supplemental responses or the results of the Department's verification, all of which fully addressed all of the petitioners' concerns. The respondents contends that a review of record evidence establishes that all of Fushun Jinly's and the Fangda Group's reported U.S. sales were *bona fide* transactions, and there is no factual or legal basis to exclude any of them from consideration in the final results.

A. Fushun Jinly's and the Fangda Group's U.S. Sales to Customer X¹³¹

The petitioners argue the following:

- The Department will weigh five factors (the timing of the sale; sale price and quantity; expenses; whether the goods were resold at a profit; and the arm's-length nature of the transaction) and any other evidence that "may speak to the commercial realities surrounding an alleged sale of subject merchandise."¹³² Verification of Fushun Jinly and Fangda did not resolve issues regarding the suspect nature of the business with Customer X, indicating that the sales are not *bona fide*.
- With respect to the timing of sales, Customer X began importing the Fangda Group's and Fushun Jinly's subject merchandise for the first time just after the preliminary results in the 2012/2013 AR or this order and stopped shortly before the final results in the same review, when the deposit rates for both respondents' imports increased significantly from *de minimis*, and have not imported since. Moreover, prior to importing respondents' subject merchandise, Customer X had only imported certain products other than SDGEs.
- With respect to pricing and profit, Fushun Jinly explained at verification that its U.S. pricing is based on the facts of less competition and high demand in the market - this explanation is not sufficient to justify Fushun Jinly's U.S. prices to Customer X that are

¹³¹ We are not disclosing the identity of a certain U.S. customer of Fushun Jinly and the Fangda Group because both companies claimed business proprietary treatment of this information.

¹³² See the petitioners' Case Brief at 45 (citing *2013-2014 Glycine from PRC* and the accompanying Preliminary Decision Memorandum at pages 3-4).

higher than its average third-country prices; the Fangda Group's U.S. prices to Customer X are similarly higher than its average third-country prices. Further, Customer X's resale prices to the U.S. distributors of SDGEs, *e.g.*, Company A, of merchandise procured from Fushun Jinly and the Fangda Group, are unreasonably high.

- With respect to expenses and other collateral costs, Customer X's purchases of SDGEs from the respondents and re-sales of the product to the U.S. distributors may have resulted in Customer X's credit risk being negated, which is not normal commercial behavior.
- With respect to the arm's-length nature of the transactions and other factors for consideration: the record also shows that Customer X may be affiliated with a company that imported other products subject to AD orders; the respondents' sales to Customer X were shipped to U.S. locations corresponding with the respondents' traditional U.S. customers; Fushun Jinly's invoices to Customer X reference the U.S. distributor's, *i.e.*, Company A's, purchase order numbers, indicating that Fushun Jinly had direct access to the purchase orders and Customer X's resale prices to U.S. distributor(s); Customer X's commercial invoices and packing lists use the same format as that by the respondents.

The respondents argue the following:

- Both companies fully explained the role of Customer X in the sales process during the POR and the reason why Customer X purchased from the companies during the POR - by becoming the U.S. importer of record, Customer X undertook all risks of possible future antidumping duty liability; on the other hand, it earned substantial profits from the business of importing subject merchandise - the prices Customer X charged the U.S. distributors were much higher than the prices Customer X paid to Fushun Jinly and the Fangda Group.
- In accordance with the Department's requests for information, both Fushun Jinly and the Fangda Group provided to the Department all communication records and all the purchase agreements/contracts among the respective respondent, Customer X, and Customer X's respective U.S. customer(s), *i.e.*, U.S. distributor(s). In addition, both companies provided a complete set of sales documentation for the first and last POR sales they made, respectively, to Customer X and Customer X's subsequent re-sales to the respective U.S. distributor(s).
- The Department verified the accuracy of both respondents' U.S. sales lists, and confirmed the accuracy of the reported sales by reviewing numerous sales traces at verification, including sales made to Customer X.
- Contrary to the petitioners' assertions, the timing of Company A's purchases of subject merchandise from both companies was entirely consistent with commercial considerations. The administrative record establishes that Customer X issued its first purchase orders to Fushun Jinly and the Fangda Group at the time that far predated the issuance of the preliminary results in the 2012/2013 administrative review. After the publication of the final results in the 2012/2013 administrative review, when the cash deposit rate for Fushun Jinly increased to 159.64 percent and the case deposit rate for the Fangda Group increased to 21.16 percent, Customer X ceased importing the subject merchandise because it was unwilling to post high AD cash deposits.

- The petitioners' comparison of higher SDGEs prices in the United States (resulting from the presence of the antidumping duty order) to lower SDGEs prices in third-country markets (that are not protected by an AD order and are subject to intense price competition) lacks commercial validity.
- The petitioners' next assertion, that Customer X's high U.S. prices charged to the U.S. distributors, as further evidence that the respondents' U.S. sales to Customer X are not *bona fide*, lacks any commercial validity. The sales transactions that are subject to scrutiny are the Fushun Jinly and the Fangda Group sales prices to Customer X, the EP transactions that form the starting point of the Department's margin calculation - any analysis of Customer X's re-sale U.S. price is not relevant to the question of whether the respondents' sales prices to Customer X were *bona fide*.
- The U.S. distributor(s)'s purchase order number, contained in the commercial invoices that Fushun Jinly and the Fangda Group issued to Customer X, represents the shipping mark instructions that the respondents receive separately from Customer X, as evident from Customer X's requirement in its purchase order – the petitioners' allegation that Fushun Jinly and the Fangda Group had direct access to the purchase orders that the U.S. distributor(s) issued to Customer X, as well as Customer X's re-sale prices, is without merit.
- The record evidence in this case establishes that all Fushun Jinly's and the Fangda Group's U.S. sales made to Customer X were *bona fide* transactions, made in accordance with normal commercial considerations. All communications and documentation requested by the Department, including purchase orders, invoices, other sales documentation, and proof of payment among the respective respondent, Customer X, and Customer X's U.S. customer(s) were duly provided to the Department. Given the Department's successful verification of the respondents' sales reconciliations and their sales traces, there is no basis to find that these sales are not *bona fide* transactions.

B. Fushun Jinly's Sole U.S. Sale to Customer Y¹³³

The petitioners argue the following:

- Record evidence suggests that Fushun Jinly's sale to Customer Y may have been a sham transaction, masking the sale of subject merchandise actually produced by Customer Y and sold to a U.S. distributor, using Fushun Jinly's cash deposit rate in order to avoid the PRC-wide cash deposit rate that would have been otherwise applicable to Customer Y.
- The situation in this administrative review surrounding Fushun Jinly's reported U.S. sale made to Customer Y mirrors that in the 2012/2013 administrative review – there, the Department applied total AFA to Fushun Jinly for providing incomplete, misleading, and unverifiable information related to Customer Y's role in its sales of Fushun Jinly's product to the U.S. distributor.
 - In this review, just as in the 2012/2013 administrative review, the statement that Fushun Jinly was “not aware of any merchandise sold to other companies in

¹³³ We are not disclosing the identity of a certain U.S. customer of Fushun Jinly because Fushun Jinly claimed business proprietary treatment of this information.

China that was ultimately shipped to the United States” has again proven false - the documentation that Fushun Jinly provided showed that Fushun Jinly sold merchandise to Customer Y, a Chinese company, with knowledge that the merchandise would be shipped to the U.S. distributor;

- There was no commercial reason for the U.S. distributor to purchase SDGEs through Customer Y at higher prices, considering that a) the U.S. distributor had been a longtime direct customer of Fushun Jinly and could have obtained a lower price by purchasing directly from Fushun Jinly, and b) Customer Y does not appear to have added any value or service to the transaction; and
- In this review, just as in the 2012/2013 administrative review, Fushun Jinly has not been forthcoming in describing the role of Customer Y in the transaction – the record lacks an explanation why this company is again inserted between Fushun Jinly and its traditional U.S. customer/U.S. distributor.

Fushun Jinly argues the following:

- Fushun Jinly’s statement that no sales of subject merchandise made to Chinese companies were resold to the United States is completely accurate. The petitioners’ assertion that Customer Y is a Chinese company is erroneous - in fact, Customer Y is a British Virgin Islands company, and its corporate registration was submitted on the record. Moreover, the sales revenue earned by Fushun Jinly on its sale to Customer Y was booked in the ledger of main operation income (foreign sales) as reflected in the accounting records shown to the Department; and Customer Y paid Fushun Jinly in U.S. dollars, which also establishes that Customer Y is a foreign company and that Fushun Jinly’s sale to it was not a domestic Chinese sale.
- There is no basis in the petitioners’ allegation that Fushun Jinly did not provide any information describing the role of Customer Y in the U.S. sales transaction. Fushun Jinly described in great detail Customer Y’s role in the transaction in response to 14 sub-questions contained in the supplemental section A questionnaire; moreover, Fushun Jinly also provided: a) a full set of sales documentation between Fushun Jinly and Customer Y, and a full set of sales documentation between Customer Y and the U.S. distributor; b) payment documentation between the U.S. distributor and Customer Y; c) all documents filed with the Chinese export authority; and d) all documents filed with CBP upon importation of the subject merchandise into the United States.
- Evidence on the record does not support the petitioners’ assertion that Customer Y actually produced the subject merchandise and created a sham transaction with Fushun Jinly in order to ship its own merchandise under the favorable AD cash deposit rate belonging to Fushun Jinly. The documentation provided to the Department contained the purchase order to Fushun Jinly from Customer Y; Fushun Jinly’s certificate of origin, Fushun Jinly’s Inspection Report and Quality Certificate; and documentation (including pictures) detailing the U.S. distributor’s physical inspection of subject merchandise at Fushun Jinly’s factory.
- Although Fushun Jinly asserted that it does not know why the U.S. distributor did not purchase the product directly from Fushun Jinly, the explanation Fushun Jinly obtained from Customer Y indicates that the company acts as the purchasing agent in China for various products, including SDGEs, for the U.S. distributor in question; Customer Y

makes a profit through its buying and selling activities, and the U.S. distributor, aware of Customer Y's mark up, gets certain benefits through its cooperation with Customer Y.

- In the 2012/2013 administrative review, the Department determined that Fushun Jinly had not sufficiently explained the full nature of its transactions with Customer Y, and also discovered that Fushun Jinly used secondary invoices to secure Fushun Jinly's cash deposit rate for entries of its product sold by Customer Y to the U.S. distributor. Unlike the facts in the 2012/2013 administrative review, in this review Fushun Jinly: 1) did not issue any secondary invoices to either Customer Y or the U.S. distributor, pertaining to the U.S. sale at issue and entry of subject merchandise into the Customs territory of the United States; 2) provided on the record two complete sets of sales documents (*i.e.*, between Fushun Jinly and Customer Y, and between Customer Y and the U.S. distributor); and 3) was fully forthcoming with respect to the details of the transaction by providing to the Department complete information in response to the Department's inquiries on this issue.

C. Respondents' Sales to Other U.S. Customers

1. The Fangda Group's U.S. Sales to Customer B

The petitioners argue that there are minor differences between the invoiced values for all U.S. sales made by Fangda Carbon to Customer B and the values recorded in the company's accounting records for these sales. Such a difference contradicts the fundamental accounting principle that the information on the invoice is the basis for the information reflected in the accounting system, and reveals a serious departure from normal business practice. That any difference in value exists between the invoice and the accounting system calls into question the invoices provided to the Department and undermines all information contained therein.

The Fangda Group argues the following:

- The petitioners' description of the discrepancy as "minor" is a great overstatement - the difference between the invoiced sales values and the values in Fangda Carbon's accounting records is a factor of approximately 0.01 percent, a truly *de minimis* amount.
- The administrative record confirms that the discrepancy is solely due to conversion and rounding differences when U.S. dollar values from the invoices, calculated on a per-pound basis, were calculated on a per-metric-ton basis in company's accounting records.¹³⁴ This discrepancy arose only with respect to sales made to Customer B, because it was the only U.S. customer for which invoiced sales values were calculated on a "USD/lb" basis.
- The *de minimis* difference between the sales values in invoiced amounts and the company's accounting records is not a result of "a serious departure from accounting practices," as the petitioners allege. Sales to Company B were accurately reported to the Department, and the Department verified two sales traces for this customer, finding no

¹³⁴ The Fangda Group exemplifies its calculations, performed in the normal course of business, for one U.S. sale made to Customer B, using the sale invoice information found in Fangda Group's Verification Report at Verification Exhibit 17 (*see* respondents' Rebuttal Brief at page 42).

discrepancies. There is no basis to find that the sales made to Company B are not *bona fide* transactions.

2. Fushun Jinly's U.S. Sales to Customers C and D¹³⁵ and the Fangda Group's U.S. Sales to Customers C and E¹³⁶

The petitioners argue that Fushun Jinly's U.S. sales to Customers C and D and the Fangda Group's U.S. sales to Customers C and E were not commercially reasonable and did not reflect *bona fide* transactions because the respondents' respective average U.S. sales prices to these respective U.S. customers were substantially higher than respondents' respective average sales prices for identical or similar product sold to third country markets.

The respondents argue that under the circumstances of this case, where Fushun Jinly's and the Fangda Group's U.S. sales are subject to an AD order and their third country sales are not subject to AD orders, a comparison of sales prices between U.S. and third-country markets is not relevant. The natural result of an AD order, *i.e.*, in a protected market, is an increase in prices - in third country markets, where there is no AD order, competition is more intense. Consequently it makes commercial sense for respondents to charge higher prices in the protected U.S. market and to charge lower prices in third-country markets that are not subject to AD orders.

3. The Fangda Group's U.S. Sales to Customer C and Customer E

The petitioners argue that the relationships between the Fangda Group and Customer C and between the Fangda Group and Customer E are not indicative of an arm's-length seller/buyer relationship. The communication records and other documentation on the record show that these customers, at times, disclosed their ultimate U.S. customers' identities to the Fangda Group. This appears to suggest that the Fangda Group may control the decision as to whether it will service the ultimate U.S. customers directly or via its Customer C or Customer E, or works in tandem with Customer C or Customer E to establish the prices to the ultimate U.S. customers.

The Fangda Group argues the following:

- Customer C and Customer E are longstanding customers of Fangda Carbon with whom Fangda Carbon maintains cooperative business relationships. In none of the previous segments of the proceeding has the Department ever found that Fangda Carbon or any member of the Fangda Group was affiliated with any of its U.S. customers; all U.S. sales have always been treated as EP sales. The Fangda Group did not report either Customer C or Customer E as the companies affiliated with the Fangda Group; the Department reviewed Fangda Carbon's affiliations at verification, including whether there were affiliations with customers, and no affiliations with the U.S. customers were found.

¹³⁵ We are not disclosing the identities of certain U.S. customers of Fushun Jinly because Fushun Jinly claimed business proprietary treatment of this information.

¹³⁶ We are not disclosing the identities of certain U.S. customers of the Fangda Group because the Fangda Group claimed business proprietary treatment of this information.

- In its responses to the Department, Fangda Carbon described its relationship with distributors in the United States and explained why Fangda Carbon does not generally sell directly to end-users. The provided response apparently satisfied the Department, as no further questions were issued to Fangda Carbon concerning this matter.
- The fact that Fangda Carbon may know the names of certain of Customer C's or Customer E's ultimate U.S. customers or that Fangda Carbon delivers merchandise directly to them is not indicative of either affiliation or a non-arm's-length relationship. It is the normal course of business for Fangda Carbon to ship merchandise directly to the ultimate U.S. customers, instead of delivering SDGEs to the U.S. distributors' location. The Department verified two of Fangda Carbon's sales to Company C and two of Fangda Carbon's sales to Company E.

Department's Position: We find that all U.S. sales reported by Fushun Jinly and the Fangda Group in this review are *bona fide* transactions. The record evidence demonstrates the following:

- (1) both respondents' respective U.S. sales prices for sales made to Customer X are not substantially different from the respondents' respective U.S. prices reported in the 2012/2013 administrative review (the most recent preceding administrative review for which data are available) for sales of identical or similar products;
- 2) Fushun Jinly's U.S. sales prices for sales made to Customer X are not substantially different from the Fangda Group's U.S. sales prices for sales of identical products both companies made to Customer X;
- 3) Both respondents' respective U.S. sales made to Customer X were re-sold at a profit by Customer X;
- 4) Both respondents' respective U.S. sales prices are not substantially different among the companies' respective U.S. customers for sales of identical or similar products;
- 5) The U.S. sales quantities for all U.S. sales reported by Fushun Jinly and the Fangda Group are not unusual or aberrational; and
- 6) Other circumstances raised by the petitioners are not persuasive to warrant a finding that any of the reported U.S. sales made by Fushun Jinly and the Fangda Group are not *bona-fide* transactions.

To determine whether a sale is "unrepresentative or extremely distortive" and, therefore, excludable as non-*bona fide*, the Department employs a totality-of-the-circumstances test.¹³⁷ In examining the totality of the circumstances, we examine whether the transaction is "commercially reasonable" or "atypical."¹³⁸ Atypical or non-typical in this context means

¹³⁷ See *Glycine From The People's Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd.*, 69 FR 47405, 47406 (August 5, 2004); and *Solid Urea from the Russian Federation: Final Results of Antidumping Duty New-Shipper Review and Rescission of Antidumping Duty Administrative Review*, 73 FR 29736 (May 22, 2008), and the accompanying Issues and Decision Memorandum at Comment 2.

¹³⁸ See *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439, 1440 (January 10, 2003).

unrepresentative of a normal business practice.¹³⁹ In evaluating whether a sale is *bona fide*, we consider, *inter alia*, such factors as: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arm's-length basis.¹⁴⁰ Therefore, we consider a number of factors in the *bona-fides* analysis, “all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.”¹⁴¹

The majority of Fushun Jinly's and the Fangda Group's U.S. sales, by quantity, were made to Customer X.¹⁴² Concerning the respondents' U.S. sales made to Customer X during the POR, both respondents explained: (1) how they came to know Customer X and what considerations resulted in them deciding to sell to Customer X a substantial volume of subject merchandise for export to the United States; and (2) why, during the POR, the bulk of sales were not made to the respondents' traditional and long-existing U.S. customers (that are known in the industry to be the actual distributors of SDGEs in the U.S. market) but, instead, were made to a company with no apparent prior experience in the SDGEs industry, with intent to re-sell to respondents' traditional U.S. customers.¹⁴³

In response to our inquiries on the issue of Customer X's role in Fushun Jinly's reported U.S. sales, Fushun Jinly provided: (1) communication records between Fushun Jinly, Customer X, and Customer X's U.S. customers; (2) all the purchase agreements/contracts between Fushun Jinly, Customer X, and Customer X's U.S. customers; and (3) for the first and last POR sales made to Customer X, complete sets of sales documentation concerning Customer X's purchase, as well as a re-sale in the United States of subject merchandise that Fushun Jinly produced.¹⁴⁴

Similarly, in response to our inquiries on the issue of Customer X's role in Fangda Carbon's reported U.S. sales, the Fangda Group provided: (1) communication records between Fangda Carbon, Customer X, and Customer X's U.S. customers; (2) all the purchase agreements/contracts among Fangda Carbon, Customer X, and Customer X's U.S. customers; and (3) for the first and last POR sales made to Customer X, complete sets of sales documentation concerning Customer X's purchase, as well as a re-sale in the United States of subject merchandise that the Fangda Group produced.¹⁴⁵

Timing of U.S. Sales

¹³⁹ See *Am. Silicon Techs. v. United States*, 110 F. Supp. 2d 992, 995 (CIT 2000) (*Silicon Techs.*).

¹⁴⁰ See *TTPC*, 366 F. Supp. 2d 1246, at 1249 (citing *Silicon Techs.*, 110 F. Supp. 2d 992, at 995). We note that the factors we are using in this administrative review are nearly identical to the factors set forth in section 751(a)(2)(B)(iv) of the Act, which governs *bona fides* analyses in new shipper reviews.

¹⁴¹ See *New Donghua*, 374 F. Supp. 2d 1333, at 1342, citing *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002) and the accompanying Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.

¹⁴² See Fushun Jinly's September 29, 2015, supplemental questionnaire response (FJ-1stSQR1) at Appendix S1-C-1 (U.S. sales list) and FG – 3rdSQR at Appendix S3-2 (U.S. sales list).

¹⁴³ See FJ – 1stSQR2 at 2-4 and FG – SACQR at S1-9.

¹⁴⁴ See FJ – 1stSQR2 at pages 5-6 and Appendix S1-A-5, S1-A-6, S1-A-7, and S1-A-8.

¹⁴⁵ See FG – SACQR at S1-10 and Appendix S1-11, S1-12, S1-13, and S1-14.

The explanations and documentation provided by the respondents revealed the following: by agreeing to become the U.S. importer of record for SDGEs exported by Fushun Jinly and the Fangda Group, Customer X assumed all risks of potential antidumping duty liability in exchange for making substantial profit in reselling the product to the respondent's traditional U.S. customers (*i.e.*, U.S. distributors) as well as other U.S. customers. In turn, the traditional U.S. customers of Fushun Jinly and the Fangda Group agreed to purchase the respondents' product from Customer X at higher prices in exchange for Customer X absolving the U.S. customers, that previously acted as importers of record, of potential antidumping duty liability. Further, the record shows that Customer X was committed to this arrangement at the time when both Fushun Jinly's and Fangda Carbon's cash deposit rates were zero - it stopped importing the respondents' SDGEs following the final results of the 2012/2013 administrative review, when Fushun Jinly's cash deposit rate increased to 159.64 percent, and the Fangda Group's cash deposit rate increased to 21.16 percent.¹⁴⁶ Thus, contrary to the petitioners' assertions, there is nothing suspect in the timing of Customer X's purchases of subject merchandise during the POR, simply because subsequently it was unwilling to post high antidumping duty cash deposits on imports of SDGEs exported by the respondents – in fact, Customer X's actions and timing thereof were entirely prudent, from the standpoint of what constitutes commercial rationality. Further, regarding the arrangement that Fushun Jinly and the Fangda Group undertook with Customer X to sell SDGEs to the U.S. distributors, the petitioners fail to cite to any law or administrative precedent that renders the underlying U.S. transactions commercially unreasonable or atypical. The respondents' commercial environment for selling SDGEs to the United States encompasses the existence of an antidumping duty order on SDGEs and, therefore, is an integral part of the companies' normal course of business.

Pricing of U.S. Sales and Profit on Re-Sales

Concerning the respondents' U.S. prices for respective U.S. sales made to all U.S. customers, we do not find that a comparison of the respondents' reported U.S. prices with their prices for contemporaneous third-country sales is appropriate here. In comparison to prices for SDGEs in third countries, prices for SDGEs in the United States are naturally higher due to the pricing discipline created by the existence of the AD order. In other words, while increases in prices of SDGEs in the United States are an intended and natural consequence of the imposition of the AD order on SDGEs, prices for SDGEs in third countries are naturally lower because those markets are not protected by an AD order.

On the basis of this rationale, we find that, in order to gauge the commercial reasonableness of the respondents' reported U.S. prices for respective sales made to Customer X, it is more appropriate to compare these prices to the U.S. prices that each respondent reported in the 2012/2013 administrative review (the most recent review for which data are available) for U.S. sales of identical product made directly to U.S. distributors (*i.e.*, before Customer X's involvement with the subject merchandise). Specifically, of the four unique SDGEs products (*i.e.*, as defined by product code) that the Fangda Group sold to Customer X during the POR, the Fangda Group reported U.S. sales of three such identical products, comprising 25 transactions (from 63 transactions in total, and approximately 48 percent of sales, by quantity), in the

¹⁴⁶ See, generally, FJ – 1stSQR2 at 2-6 and Appendix S1-A-5, S1-A-6, S1-A-7, and S1-A-8, and FG – SACQR at S1-9, S1-10 and Appendix S1-11, S1-12, S1-13, and S1-14.

2012/2013 administrative review. Its reported 2012/2013 U.S. prices were in a close proximity to its reported U.S. prices for sales made to Customer X for those products; in fact, the POR U.S. prices for all three identical products are lower than those reported in the 2012/2013 administrative review.¹⁴⁷ Further, for the remaining unique SDGE products that the Fangda Group sold to Customer X during the POR, the Fangda Group reported U.S. sales of two similar products (*i.e.*, same power level and closest diameters and lengths), comprising two transactions (and, approximately four percent of sales, by quantity), in the 2012-2013 administrative review. Its reported 2012/2013 U.S. prices were in a close proximity to the reported U.S. prices for sales made to Customer X for that product; in fact, the POR U.S. prices for this similar product are lower than those reported in the 2012/2013 administrative review.¹⁴⁸

Similarly, of the 14 unique SDGE products (*i.e.*, defined by product code) that Fushun Jinly sold to Customer X during the POR, Fushun Jinly reported U.S. sales of one such identical product, comprising five transactions (from five transactions in total), in the 2012/2013 administrative review. Its reported 2012/2013 U.S. prices were in a close proximity to its reported U.S. prices for sales made to Customer X for that product.¹⁴⁹ Moreover, we observed that Fushun Jinly's POR U.S. prices for the bulk of sales of SDGEs made to Customer X (comprising 53 transactions of 64 in total, and 79 percent of sales by quantity made to Customer X) of products similar (*i.e.*, same power level and close in diameter and length) to the one it sold in the 2012/2013 administrative review were in close proximity to the U.S. prices it reported in the 2012/2013 administrative review; these similar products constitute eight of 14 unique products sold to Customer X during the POR.¹⁵⁰ As an additional measure, because there was an overlap in only one identical product that Fushun Jinly sold to Customer X during the POR and all its U.S. sales reported in the 2012/2013 administrative review, we also compared Fushun Jinly's POR U.S. prices for sales it made to Customer X to the Fangda Group's POR U.S. prices for sales it made to Customer X for identical products. Specifically, of four unique SDGE products that the Fangda Group sold to Customer X during the POR, Fushun Jinly reported U.S. sales made to Customer X of three such identical products, comprising 33 transactions (from 64 transactions in total, and over 41 percent of sales, by quantity, made to Customer X) during the POR. Fushun Jinly's reported U.S. prices were in close proximity to the Fangda Group's reported U.S. prices between the companies' respective U.S. sales made to Customer X for those

¹⁴⁷ For the pricing analysis the Department conducted, *see* Fangda Group Analysis Memo at Attachment 1; *see also* letter to all interested parties dated August 10, 2016 (containing Fangda Group's U.S. sales list submitted in the 2012/2013 administrative review).

¹⁴⁸ *Id.*

¹⁴⁹ For the pricing analysis the Department conducted, *see* memorandum to file, "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Final Results Analysis Memorandum for Fushun Jinly Petrochemical Co., Ltd.," dated concurrently with this memorandum (Fushun Jinly Analysis Memo) at Attachment 1; *see also* letter to all interested parties dated August 10, 2016, at Attachment 2 (containing Fushun Jinly's U.S. sales list submitted in the 2012/2013 administrative review).

¹⁵⁰ *Id.*

three identical products.¹⁵¹ Further, for three other unique SDGE products that Fushun Jinly sold to Customer X during the POR (comprising 13 transactions from 64 transactions in total, and over 26 percent of sales, by quantity, made to Customer X), the Fangda Group reported POR U.S. sales of similar products (*i.e.*, same power level and close in diameters and same lengths) it made to Customer X. Fushun Jinly's reported U.S. prices were in close proximity to the Fangda Group's reported U.S. prices between the companies' respective U.S. sales made to Customer X for those similar products.¹⁵²

Concerning Fushun Jinly's U.S. sales made to Companies Y, C, and D, we analyzed Fushun Jinly's U.S. sales list and observed that its U.S. prices for specific products sold to each of these customers were in close proximity to the U.S. prices for sales made to other U.S. customers that purchased identical or similar products from Fushun Jinly during the POR.¹⁵³

Similarly, concerning the Fangda Group's U.S. sales made to Companies B, C, and E, we analyzed the Fangda Group's U.S. sales list and observed that its U.S. prices for specific products sold to each of these customers were in close proximity to the U.S. prices for sales made to other U.S. customers that purchased identical or similar product from the Fangda Group during the POR.¹⁵⁴

The aforementioned pricing analyses refute unequivocally the petitioners' assertions that the respondents' reported U.S. prices are aberrational or commercially unreasonable.

The record also establishes that all SDGEs that Fushun Jinly and the Fangda Group sold, respectively, to Customer X during the POR were re-sold by Customer X to its U.S. customers at a profit.¹⁵⁵ This particular point supports our finding that the respondents' U.S. sales made to Customer X constitute *bona fide* transactions. Further, while we consider the profitability associated with the re-sales of respondents' product in our *bona fide* analysis, we disagree with the petitioners that any further analysis of Customer X's re-sale U.S. prices is relevant to the question of whether the respondents' U.S. sales to Customer X were *bona fide* transactions. As the respondents accurately point out, the first sales to the United States under review (that form the basis for establishing the U.S. prices under the statute in our margin calculations) were made by Fushun Jinly and the Fangda Group to Customer X.

The sales lists that the Fangda Group and Fushun Jinly submitted, respectively, in the 2012/2013 administrative review (that were used in the pricing analyses discussed above) were placed on

¹⁵¹ For the pricing analysis the Department conducted, see Memorandum to File, "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Comparison of Respondents' Prices Concerning U.S. Sales Made to a Certain U.S. Customer," dated concurrently with this memorandum, at Attachment 1; see also FJ– 1stSQR1 at Appendix S1-C-1 (Fushun Jinly's U.S. sales list) and FG – 3rdSQR at Appendix S3-2 (Fangda Group's U.S. sales list).

¹⁵² *Id.*

¹⁵³ See Fushun Jinly Analysis Memo at Attachment I; see also FJ– 1stSQR1 at Appendix S1-C-1 (U.S. sales list).

¹⁵⁴ See the Fangda Group Analysis Memo at Attachment I; see also FG – 3rdSQR at Appendix S3-2 (U.S. sales list).

¹⁵⁵ See FJ – 1stSQR2 at 5 and Appendix S1-A-5 (for all purchase agreements/contracts among Fushun Jinly, Customer X and Customer X's U.S. customers), and FG – SACQR at S1-10 and Appendix S1-12 (for all purchase agreements/contracts among the Fangda Group, Customer X and Customer X's U.S. customers).

the record of this administrative review on June 10, 2016.¹⁵⁶ The petitioners¹⁵⁷ and the respondents¹⁵⁸ commented on this factual information, and we considered their comments.

Specifically, the petitioners commented that both the Fangda Group and Fushun Jinly drastically changed the pattern and volume of their U.S. sales from the 2012-2013 administrative review. Unlike then, when companies made direct sales to their traditional U.S. distributors, in the current review the companies made the majority of their sales to Customer X for re-sale to the U.S. distributors, demonstrating that the companies' behavior in the current review is not representative of the companies' normal business practices. Further, the petitioners commented that the POR average re-sale price of Customer X to certain U.S. distributors in this review was substantially higher than the respondents' average prices in the 2012-2013 administrative review or the domestic industry's POR-average price in the current review. Thus, the petitioners allege, the 2012-2013 sales information confirms that the respondents' reported prices in the current review are aberrational and not reflective of normal commercial prices.

The respondents commented that the petitioners provided invalid price comparisons. Specifically, the respondents commented: (1) the petitioners engaged in a false analysis by comparing the respondents' respective 2012-2013 U.S. sales prices that were made on an "Free on Board" (Chinese port) basis to Customer X's POR U.S. re-sale prices for sales to its downstream U.S. customers made on a "Delivered Duty Paid" (DDP) basis – the DDP prices will obviously be higher because they include the costs for ocean freight, marine insurance, U.S. brokerage and handling, customs charges, and U.S. inland freight, as well as Customer X' substantial profit; (2) the petitioners' price comparisons are based on the review-average U.S. price reported by the respondents, without any regard to differences in SDGE power levels, length, diameter, and connecting system, rather than CONNUM-specific price comparisons of identical merchandise – the record shows the prices for different power levels of SDGEs vary widely; and (3) the petitioners' comparisons of the domestic industry's average POR price with the respondents' respective 2012-2013 review-average U.S. price are of no value because the proffered domestic industry's U.S. price is not backed by any supporting documentary evidence (*i.e.*, invoices, proof of payment) and it is not clear what specific products the domestic industry's U.S. price reflects. The respondents provided an analysis comparing each respondent's respective 2012-2013 prices to the POR prices of their respective sales made to Customer X on a CONNUM-specific basis. The respondents concluded that, in most instances, the POR sale prices were the same or lower than the reported prices for identical merchandise in the 2012-2013 review – any observable increases were not substantial, in either absolute or relative terms, particularly given a two-year period between data points. Further, the respondents commented, the changes in U.S. sales volumes from year to year are neither an unusual event nor unrepresentative of normal commercial behavior. A company's U.S. import volume is subject to normal commercial considerations, such as market demand, the availability of product from

¹⁵⁶ See our letter to all interested parties, dated August 10, 2016 (containing respondents' respective U.S. sales lists submitted in the 2012-2013 administrative review, and providing an opportunity to comment).

¹⁵⁷ See the petitioners' submission, "6th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China – Petitioners' Comments on New Factual Information Placed Into the Record by the Department," dated August 12, 2016.

¹⁵⁸ See the respondents' submission, "Small Diameter Graphite Electrodes from China: Rebuttal to Petitioner's August 12, 2016 Comments," dated August 16, 2016.

alternate domestic or third-country markets, and the changing AD deposit rates in effect at different times. Both respondents' respective POR volumes of exported subject merchandise must be considered of sufficient quantity to be deemed normal commercial sales volumes.

We do not find the petitioners' comments persuasive concerning the 2012-2013 sales data that we placed on the record of this review. First, as we discussed above, the petitioners do not explain why the respondents' selling arrangement through Customer X to its traditional U.S. distributors is, in itself, demonstrative of behavior that is unrepresentative of normal business practices, given the companies' reality of operating within the confines of an AD order on SDGEs. The record in this review merely shows an arrangement where the U.S. distributor intentionally agreed to trade its risk of potential AD liability in exchange for the premium prices it paid to the entity, *i.e.*, Customer X, who assumed such a risk on its behalf, by becoming the U.S. importer of record.¹⁵⁹ This fact pattern is separate from and does not, in any way, cast a shadow on the commercial validity of the respondents' U.S. prices for their sales made to Customer X. In other words, the fact that the pattern of sales in this review differs from that in the 2012-2013 review (the last time the mandatory respondents were examined) is nothing more than an indication of the parties to the transaction reacting and adapting to the fluctuation of AD cash deposit rates from one administrative review to the next.

Second, as explained above, Customer X's resale prices to the U.S. distributor are irrelevant in ascertaining whether the respondent's reported prices for sales made to Customer X are reflective of the respondents' normal commercial practices – the sales under examination in this review are the latter, not the former. The petitioners' proffered pricing analysis confuses this issue because it conflates Customer X' average re-sale price with either the respondents' average price in this review for sales made to Customer X or the respondents' average price in the 2012-2013 review. Further, we agree with the respondents that the petitioners' pricing comparisons are substantially flawed and off-point for all the reasons the respondents cited, as summarized in detail, above. Notably, the fact that the domestic industry's average POR price was less than Customer X's average re-sale price in the United States does not, in itself, suggest that the respondents' reported U.S. prices to Customer X were unreasonably high. The petitioners did not provide any information on the record showing a similarity in the product mix, volumes, terms of sale, channels of distribution, or the U.S. customer base, between the sales made by Customer X in the United States and sales made by the domestic industry in the United States. Nevertheless, our pricing analyses, described above, demonstrate that the respondents' U.S. prices reported in this review were in close proximity to their U.S. prices reported in the 2012-2013 administrative review. This finding demonstrates that any difference between the respondents' POR U.S. prices to Customer X and Customer X's re-sale U.S. prices to the U.S. distributors is only attributable to: (1) Customer X purchasing the product from the respondents on an FOB basis and reselling it on a DDP basis; or (2) Customer X's built-in profit for the compensation of taking on the risk of becoming the U.S. importer of record. As demonstrated by the record, the said difference does not, in any way, undermine the commercial validity of the respondents' reported POR U.S. prices for their U.S. sales made to Customer X.

Quantities of U.S. Sales

¹⁵⁹See, generally, FJ – 1stSQR2 at 2-6 and FG – SACQR at S1-9, S1-10.

We find nothing unusual or aberrational about the sale-specific quantity for any of Fushun Jinly's or the Fangda Group's reported U.S. sales. The reported quantities are reflective of normal commercial quantities concerning SDGEs. Specifically, we examined Fushun Jinly's and the Fangda Group's respective export sales sub-ledgers, and found that the quantities for the reported U.S. sales of SDGE were comparable to the quantities of contemporaneous sales of SDGEs that each respondent made to other countries.¹⁶⁰ Further, we observed that for all transactions that the Fangda Group reported in this review, the sale-specific quantities were comparable to the sale-specific quantities reported in the 2012-2013 review.¹⁶¹ Similarly, we observed that for 38 (from the total of 71) transactions that Fushun Jinly reported in this review, the sale-specific quantities were comparable to the sale-specific quantities that it reported in the 2012-2013 review. We note, however, that this comparison is somewhat inhibited by the limited number of transactions, *i.e.*, five, that Fushun Jinly reported in the 2012-2013 review.¹⁶² Importantly, the petitioners did not allege that the quantities of U.S. sales reported by either Fushun Jinly or the Fangda Group are commercially unreasonable, unrepresentative, or, otherwise, atypical of the SDGEs market in the United States.

Other Alleged Circumstances

We disagree with the petitioners' assessment of the arm's-length nature of Fushun Jinly's and the Fangda Group's transactions with certain U.S. customers. The record does not support the petitioners' allegation that Fushun Jinly and the Fangda Group had direct access to the purchase orders that the U.S. distributor(s) issued to Customer X, as well as Customer X's re-sale prices. In response to the Department's request for information on this matter, Fushun Jinly explained:

{Fushun} Jinly knows from the bills of lading that {Customer X} resells the products purchased from Fushun Jinly during the POR to customers in the United States, including to some of Jinly's former U.S. customers. However, Jinly is not aware of the price that {Customer X} resells the electrodes to those customers.¹⁶³

Similarly, in response to the Department's request for information on this matter, the Fangda Carbon explained:

Fangda {Group} knew that {Customer X} resold the products purchased from Fangda during the POR to Fangda Carbon's traditional U.S. customers and/or some other U.S. distributors. Fangda Carbon is not aware of the price that {Customer X} sold the subject

¹⁶⁰ See FJ – 1stSQR1 at Appendix S1-C-2 (Table C) and FG – SACQR at Appendix S1-26.

¹⁶¹ Compare the information in FG – 3rdSQR at Appendix S3-2 (Fangda Group's POR U.S. sales list) with information in Attachment 1 of August 10, 2016, letter to all interested parties (Fangda Group's 2012-2013 U.S. sales list).

¹⁶² Compare the information in FJ – 1stSQR1 at Appendix S1-C-1 (Fushun Jinly's POR U.S. sales list) with information in Attachment 2 of August 10, 2016, letter to all interested parties (Fushun Jinly's 2012-2013 U.S. sales list).

¹⁶³ See FJ – 1stSQR2 at 5 (the italicized information in curly brackets identifies business proprietary information that was re-stated in a public form).

merchandise to these customers.¹⁶⁴

As the record shows, the respondents' invoices issued to Customer X reflect the U.S. distributor's purchase order numbers. The Fangda Group explained on the record¹⁶⁵ that the U.S. distributor's purchase order numbers represent the shipping mark instructions that the respondents receive separately from Customer X, as evident from Customer X's requirement in its purchase orders. This information is indicative of the respondents' potential knowledge of the ultimate U.S. customers' identities, based on their familiarity with the U.S. shipping locations. There is nothing on the record to indicate that the respondents had direct access to the U.S. distributor's purchases orders (issued to Customer X), or knew of Customer X's re-sale prices to the U.S. distributor. More importantly, Customer X is not affiliated with either the Fangda Group or Fushun Jinly, and the petitioners have not advanced any record evidence that persuasively establishes a close supplier/buyer relationship between the respondents and Customer X.

We disagree with the petitioners that the relationships between the Fangda Group and Customer C and between the Fangda Group and Customer E are not indicative of an arm's-length seller/buyer relationship. The Fangda Group explained Fangda Carbon's relationship with the U.S. distributors and why Fangda Carbon does not generally sell directly to end-users in its supplemental response.¹⁶⁶ These explanations reveal that, while the Fangda Group is not opposed to selling directly to end-users, the U.S. distributors have traditionally been involved for a number of years in procuring SDGEs from the various producers of SDGEs on behalf of end-users; Companies C and E are longstanding customers of Fangda Carbon with which Fangda Carbon maintains cooperative business relationships that are required in effectively meeting the SDGEs needs of end-users. Thus, contrary to the petitioners' assertion, the issue is not that the Fangda Group controls the decision as to whether it will service the ultimate U.S. customers directly or *via* Customer C or E but, rather, that it is the end-users' preference to have their sourcing requirements fulfilled by the U.S. distributors. Moreover, as the Fangda Group correctly points out, Customers C and E are not affiliated with the Fangda Group and the petitioners have not advanced any record evidence that unequivocally establishes a close supplier/buyer relationship between the Fangda Group and the companies in question. Further, the record does not dispute the Fangda Group's assertion that it is the normal course of business to ship merchandise directly to the ultimate U.S. customers, instead of delivering SDGEs to the U.S. distributors' location. Therefore, we agree with the Fangda Group that the fact that it may know the names of certain of Customer C's or Customer E's ultimate U.S. customers, or that it delivers merchandise directly to them, is not any indication of a non-arm's-length relationship.

We also disagree with the petitioners' assertion that the minor differences between the invoiced values for all U.S. sales made by Fangda Carbon to Customer B and the values recorded in the company's accounting system for these sales call into question the validity of the invoices submitted to the Department. The record shows that the U.S. sales by Fangda Carbon to

¹⁶⁴ See FG – SACQR at S1-10 (the italicized information in curly brackets identifies business proprietary information that was re-stated in a public form).

¹⁶⁵ See the Respondents' Rebuttal Brief at 36 (citing relevant record evidence).

¹⁶⁶ See FG – 3rdSQR at 10.

Company B state the U.S. prices on the invoices on a per-pound basis, and the quantity in both metric tons and pounds. To reflect the sales values in its accounting records, Fangda Carbon converted the per-unit invoice price from the per-pound basis to the per-metric tons basis, rounded the per-unit price to the nearest whole dollar, and then multiplied the result by the invoiced quantity in metric tons – the total value obtained was then used to make general ledger entries.¹⁶⁷ The sales values reflected in Fangda Carbon’s accounting records confirm that the minor differences from the invoiced values are the result of the company rounding the per-unit price, converted from the “USD/LB” to “USD/MT” basis, to the nearest whole dollar. The differences the petitioners identified are miniscule, in percentage terms, and the accounting records reflect the correct invoice numbers and values. Accordingly, we find no merit in the petitioners’ arguments that Fangda Carbon’s record keeping amounts to a “serious departure from normal accounting practices,” and that this phenomenon renders suspect the sales information that the Fangda Group reported for Company B.

Concerning Fushun Jinly’s sole reported U.S. sale made to Customer Y, we disagree with the petitioners that the facts in this review resemble the circumstances in the 2012-2013 administrative review, where we applied AFA to Fushun Jinly. In the 2012-2013 review, we found:

- 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.
- The contradictory information provided by Fushun Jinly led the Department to conclude 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, *i.e.*, Customer Y, in the sales process associated with Fushun Jinly’s reported U.S. transactions until late in the administrative review.
- 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.
 - In determining the appropriate cash deposit rate associated with Fushun Jinly’s merchandise, 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 Y to the importer, the merchandise entered 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.
- Ultimately, 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 that proceeding. Further, we found that Fushun Jinly’s admittance of certain actions it undertook with respect to entries of subject merchandise cast doubt on

¹⁶⁷ See, e.g., Fangda Group Verification Report at Verification Exhibits 17 and 19.

the accuracy of Fushun Jinly's response in its entirety.¹⁶⁸

In the present case, unlike in the 2012-2013 administrative review, Fushun Jinly was fully forthcoming with respect to the details of the transaction by providing all the information the Department requested. The role played by Company Y was detailed by Fushun Jinly in its responses to the Department's 14 distinct questions on the issue.¹⁶⁹ Specifically, Fushun Jinly provided the following: (1) full sets of sales documents related to the U.S. sale between Fushun Jinly and Company Y (including the sales contract, invoice, communication records, packing list, the Export License for Dual-Use Items and Technologies of PRC, and payment documentation), and the U.S. re-sale between Company Y and the U.S. distributor (including the purchase order, invoice, communication records, packing list, bill of lading, and CBP Form 7501);¹⁷⁰ (2) the U.S. distributor's proof of payment to Company Y;¹⁷¹ (3) the U.S. distributor's inspection report (for physical inspection by the U.S. distributor's China office of Fushun Jinly's product at its facility prior to shipment) and pictures;¹⁷² (4) the complete export declaration package filed with PRC Customs, and complete entry package filed with CBP;¹⁷³ (5) Fushun Jinly's accounting records reflecting the recognition of sale made to Company Y and Company Y's payment;¹⁷⁴ (6) Fushun Jinly's Certificate of Origin;¹⁷⁵ Fushun Jinly's Inspection Report and Quality Certificate;¹⁷⁶ and (7) Company Y's Certification of Incorporation.¹⁷⁷

The aforementioned information and documentation submitted in this review does not support the petitioners' assertion that Fushun Jinly's sale to Customer Y was a sale to a Chinese company, with knowledge that the merchandise would be shipped to the U.S. distributor. Unlike in the 2012-2013 administrative review, the record of this review supports Fushun Jinly's statement that Company Y is, in fact, a company domiciled in the British Virgin Islands (on the basis of the Certificate of Incorporation for Company Y submitted in the record);¹⁷⁸ and the company merely acts as a purchasing agent in China for the U.S. distributor which procures SDGEs and other products in China, on the basis of an existing relationship between Company Y and the U.S. distributor.¹⁷⁹ Further proof that Fushun Jinly's sale to Company Y was not a domestic sale is that Fushun Jinly invoiced and received payment from Company Y in U.S. dollars, and recognized the revenue from the sale to Company Y in its accounting records as an export transaction.¹⁸⁰

¹⁶⁸ See *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 57508 (September 25, 2014) (*Electrodes AR4*) and the accompanying Issues and Decision Memorandum at Comment 1.

¹⁶⁹ See FJ – 1stSR2 at 7-14.

¹⁷⁰ *Id.*, at Appendix S1-A-16 and S1-A-15.

¹⁷¹ *Id.*, at Appendix S1-A-17.

¹⁷² *Id.*, at Appendix S1-A-18.

¹⁷³ *Id.*, at Appendix S1-A-19.

¹⁷⁴ *Id.*, at Appendix S1-A-23.

¹⁷⁵ *Id.*, at Appendix S1-A-25.

¹⁷⁶ *Id.*, at Appendix S1-A-26.

¹⁷⁷ *Id.*, at Appendix S1-A-22.

¹⁷⁸ *Id.*, at page 13 and Appendix S1-A-22.

¹⁷⁹ *Id.*, at pages 7 through 8.

¹⁸⁰ *Id.*, at Appendix S1-A-16 and S1-A-23.

Evidence on the record does not support the petitioners' assertion that Customer Y actually produced the subject merchandise and created a sham transaction with Fushun Jinly in order to ship its own merchandise under the favorable AD cash deposit rate belonging to Fushun Jinly. The documentation in this review (the purchase order from Customer Y to Fushun Jinly, Fushun Jinly's Certificate of Origin, Inspection Report, and Quality Certificate, and the U.S. distributor's PRC offices' inspection of merchandise at Fushun Jinly's plant) all confirm that Fushun Jinly is the manufacturer of subject merchandise that Company Y re-sold to the U.S. distributor. Most importantly, unlike in the 2012-2013 administrative review, the record in this review lacks any evidence that contradicts Fushun Jinly's statement¹⁸¹ that it did not issue any secondary invoices to either Company Y or the U.S. distributor in order to enter the subject merchandise (underlying the transaction in question) into the customs territory of the United States at a cash deposit rate advantageous to the importer of record.

We find that the totality of the circumstances supports a finding that the U.S. sales reported by Fushun Jinly and the Fangda Group in this review are consistent with normal commercial practices. The record, taken as a whole, does not demonstrate that the reported U.S. transactions were structured to evade AD duties or mask dumping margins, as suggested by the petitioners in their case brief. Accordingly, we find that there is no basis to exclude from consideration any of the respondents' reported U.S. sales on the grounds that they are not *bona fide* transactions.

Comment 5: Universe of Sales (Fangda Group)

The petitioners argue that the Department should apply total AFA to the Fangda Group because it failed to report all U.S. sales of subject merchandise. The petitioners identified one sale in the sales sub-ledger in Verification Exhibit 17. This sale carries invoice number 141162CUS01, and according to the respondent's response to section C of the initial questionnaire, the "US" indicates destination. This sale is not reported in the Fangda Group's U.S. sales database.

The respondent argues the following:

- Invoice number 141162CUS01 was exported to Canada, not to the United States, sold to Company A, and was correctly excluded from the U.S. sales database. Company A is based in the United States, but the goods were delivered to Canada.
- The Fangda Group's first supplemental response clarified its invoice coding system and explains that its initial response to section C of the questionnaire was incorrect. The country code is at the third and fourth positions from the end of the invoice number, *e.g.*, "US" or "CA" indicating the United States or Canada respectively, does not stand for the destination country of the exported merchandise but rather stands for the country in which the customer was located.
- For example, the Fangda Group's sales to the United States at observations 3, 4, 5, and 24 were made to Customer C and observation numbers 8 and 13 were made to Customer E. Both of these companies are located in Canada, and the location code CA was designated in the invoice number. The Department's verification of Fangda Carbon's sales traces

¹⁸¹ *Id.*, at page 9.

included two U.S. sales to Customer E and two U.S. sales to Customer C and each sale had an invoice number with the code CA.

- SDGEs included in invoice number 141162CUS01 were exported by the Fangda Group to Company A at a destination in Canada, as evidenced by the first page of the purchase order, which clearly states the address of delivery. The sale appears in Fangda Carbon's export sales sub-ledger for account 6001. Further, as explained at verification, this portion of the invoice number was not used to determine which sales were included in the U.S. sales database. Rather, all commercial invoices for export sales were collected and used to determine the place of delivery. The Department also conducted various completeness tests to confirm the thoroughness of Fangda Carbon's reported U.S. sales database.
- For these reasons, the Department should continue to use the Fangda Group's U.S. sales database for purposes of the final results. The record does not support a finding that the U.S. sales database is incomplete, or that the country code in the invoice number indicates a place of delivery.

Department's Position: The record reflects that the Fangda Group fully cooperated in this review by reporting all POR U.S. sales of subject merchandise. Accordingly, an application of AFA is not warranted. Furthermore, as discussed below, an application of facts available, pursuant to section 776(a) of the Act, is not warranted. We have all the necessary information on the record necessary to make a decision on this matter, the Fangda Group has not withheld any information, its responses were timely filed, the Fangda Group has not impeded this segment of the proceeding, and the Department verified its responses.

The Fangda Group's reported U.S. sales database is complete. The section C questionnaire response, which the Fangda Group relied on to support its contention that the country code in the invoice number indicates the place of delivery, was later clarified by the Fangda Group.¹⁸² The country code part of the invoice number is not the country of destination but rather is the country of the customer placing the order, as clarified in the supplemental responses of the Fangda Group.¹⁸³ The Fangda Group's purchase orders and invoices identify the place of delivery. We agree with the respondent that the verification tests support its contention that the U.S. sales database is complete and accurate.¹⁸⁴

We did not require, at any point during the review, that the Fangda Group report the transaction at issue as its U.S. sale of subject merchandise during the POR. Accordingly, all the necessary information is available on the record of this review for purposes of our analysis.

Comment 6: Reporting of Forming Scrap (Fangda Group)

¹⁸² See the Fangda Group's June 22, 2015, Section C questionnaire response (FG – CQR) at pages C-13 through C-14.

¹⁸³ See FG – SACQR at page S1-22, Fangda Group Verification Report at Verification Exhibits 15 and 18 (relating to Customer E) and Verification Exhibits 11 and 12 (relating to Customer C), and FG – 3rdSQR at Appendix S3-4 (although the record does not contain the commercial invoice for this sale the record supports respondent's argument that the purchase order correctly identifies the place of delivery.)

¹⁸⁴ See Fangda Group Verification Report at 16-18 and Verification Exhibit 20.

The petitioners argue the following:

- In the final results, the Department should apply a facts available analysis pursuant to section 776(a)(1) of the Act to value forming scrap as a reintroduced input for the Fangda Group, because the record lacks data regarding the Fangda Group's use of forming scrap in this administrative review. The record demonstrates that the Fangda Group has the ability to track and report forming scrap and has deliberately chosen not to do so. Therefore, pursuant to section 776(b) of the Act, the Department should use AFA to determine the factor for forming scrap. The Department should, as partial AFA, apply the largest quantity of forming scrap found for any product sold by the Fangda Group in the last administrative review. That factor should be valued using HTS 2713.12, "Petroleum Coke, Calcined," as it was in the 2012-2013 administrative review.
- The Fangda Group did not submit an FOP for reintroduced forming scrap data in this review.
- The Fangda Group valued this input in the previous administrative review; however, when it was asked to supply similar data in this review, it was not forthcoming, stating that "Forming scrap is treated consistently with the initial investigation and previous administrative reviews,"¹⁸⁵ meaning it was unreported. When asked to describe why reintroduced forming scrap was reported previously but could not be reported now, the Fangda Group blamed a consultant "who lacked full knowledge of the complicated production process of small diameter graphite electrodes."
- The Fangda Group argues that, in the original investigation and in the first and third administrative reviews, it did not regard forming scrap as an input because it is not accurately tracked in its books and records. Despite this claim, the Fangda Group reported consumption of reintroduced forming scrap in the 2012-2013 administrative review and, therefore, should be able to do so again. The Fangda Group argues that its methodology is appropriate, given the Department's allegedly consistent pattern of not valuing forming scrap. In litigation concerning the valuation of forming scrap in the 2012-2013 administrative review, the Fangda Group did not challenge the fact that the Department valued forming scrap. It only challenged how that forming scrap was valued, and never claimed that the forming scrap factor it reported was inaccurate.¹⁸⁶

Fangda Group argues the following:

- There are no grounds for AFA. The Fangda Group fully complied with all of the Department's information requests and submitted all its FOP databases, and revisions thereto, in supplemental responses, in a timely manner. The Department never directed the Fangda Group to report forming scrap as a raw material input or by-product. Neither

¹⁸⁵ See the petitioners' Case Brief at 58 (citing the Fangda Group's December 2, 2015, supplemental questionnaire response (FG – SDQR) at Exhibit SD-1.1).

¹⁸⁶ See *Electrodes AR4* and the accompanying Issues and Decision Memorandum at Comment 8. See also, *Fushun Jinly Petrochemical Carbon Co., Ltd., and Fangda Carbon New Material Co., Ltd v. United States*, Slip Op. 16-25, at 4 and 9 (the Fangda Group's argument on appeal regarding forming scrap related to the surrogate value chosen and not the reporting of the consumption of the re-introduced forming scrap).

the questionnaire nor the Department's third supplemental questionnaire directs the Fangda Group to report forming scrap. The third supplemental questionnaire asks the Fangda Group to explain why it did not report reintroduced forming scrap or report it. The Fangda Group's response to this question explains that forming scrap is added to the mixture that is extruded in the forming stage, but that any forming scrap generated in one batch is used in the next batch of the same type of merchandise, and that forming scrap movements are internal to the forming workshop and, therefore, not tracked in the ordinary course of business.

- The Fangda Group reported forming scrap as a raw material input in its FOP databases in the 2012-2013 administrative review. In the instant administrative review, however, and consistent with the manner in which the Fangda Group reported its FOP databases in the initial investigation, the first administrative review, and the third administrative review, and consistent with the manner in which Fushun Jinly has reported its FOP data bases in all the proceeding segments in which it participated, the Fangda Group did not report forming scrap as either a raw material input when introduced into forming, or scrap or by-product at its creation. Therefore, the Fangda Group is using a methodology that was previously allowed by the Department, and not questioned by the petitioners.
- The difference between forming scrap and the other scrap or by-product items re-introduced into its production processes is that the latter, *e.g.*, baking scrap and graphite scrap, were generated in production stages other than the forming stage. Because the non-forming scrap re-introduced items were transferred between workshops, there are "in" and "out" workshop materials transfer books and records. There are no similar records for forming scrap because it is internally re-used in the forming workshop and its movements inside the workshop are not recorded as either an input or output. For this reason, the creation and consumption of forming scrap is not accurately tracked in the ordinary course of business.
- In steel cases, the Department does not value scrap that is reintroduced into production and assigns all costs of production to good output. Accordingly, forming scrap should not be valued.
- Forming scrap is not an input or a by-product, because it is reintroduced into the same stage in which it is created. As a result of verification, the Department found that forming scrap is created at the beginning and at the end of extrusion, which is the last step of the forming stage. Furthermore, forming scrap is quickly introduced into another processing pass at extrusion, and as a result, is not considered in the cost accounting system, because every batch uses the same bit of the last batch.
- The Department verified the completeness and accuracy of the Fangda Group's FOP databases. For purposes of the final results, the Department should continue to use Fangda Carbon's reported FOP databases.

Department's Position: The record reflects that the Fangda Group fully cooperated in this review by providing all the necessary information concerning all inputs of production. Accordingly, an application of AFA is not warranted. Furthermore, as discussed below, an application of facts available, pursuant to section 776(a) of the Act, is not warranted. We have all the necessary information on the record, the Fangda Group has not withheld any information, its responses were timely filed, the Fangda Group has not impeded this segment of the proceeding, and the Department verified its responses.

We agree with the Fangda Group, insofar as we find it appropriate to exclude the re-introduction of forming scrap into the production process. Also, we do not find it necessary to grant a scrap offset for the production of forming scrap.

The petitioners' proposed methodology (*i.e.* the addition of forming scrap in the FOP buildup) does not account for the creation of the scrap itself, but only accounts for the fact that some forming scrap from a previous processing run is included with the amount of inputs called for in the forming stage recipe. We find that the creation of forming scrap and the inclusion of the reintroduced forming scrap from an earlier processing run of the identical recipes cancel out one another, *i.e.*, the amount of scrap is equivalent to the amount of the reintroduced scrap.¹⁸⁷ There is no evidence on the record that any amount of forming scrap leaves the workshop, is repurposed in any way, or that the creation of the scrap from one processing run is not used completely in the next processing run of the identical recipe (as described by the Fangda Group). Any additional processing cost carried by the reintroduced forming scrap compared to the baseline inputs was absorbed by the processing of the batch which created the forming scrap and is, therefore, included in every batch and need not be valued. For this reason, it is not necessary to determine a surrogate value (SV) for forming scrap, the input (*i.e.*, re-introduced forming scrap), or to include such values in the FOP buildup.

With respect to arguments from the parties concerning whether the inclusion of forming scrap in the production process was allowed or disallowed in previous segments of this proceeding, we find that the information available on the record of this review indicates that we should not grant a scrap offset for forming scrap or include re-introduced forming scrap in the FOP buildup. Further, decisions in previous reviews on this matter have no bearing on the decision in the instant review, because each administrative review stands on its own.¹⁸⁸ Strict adherence to what took place in the prior administrative review, as the petitioners' request, ignores the "best available information" in this review.¹⁸⁹

In this review, we: (i) closely examined the necessity of reporting forming scrap, in addition to the Fangda Group's explanation that forming scrap generation and consumption is internal to the forming step;¹⁹⁰ (ii) explored the potential documentary evidence and production process at verification through a discussion of the forming step with operations staff; (iii) searched for evidence of forming scrap stock handling ledgers; and (iv) conducted a visual inspection of the forming workshop.¹⁹¹ We found that an amount of forming scrap passes from one production run to the next production run of a recipe, that the amount of forming scrap does not grow from one production run to the next in any meaningful way, and that the forming scrap produced in one production run of a recipe is consumed in the next production run. The product-specific

¹⁸⁷ See Fangda Group Verification Report at 14 and FG – 3rdSQR at 10-15.

¹⁸⁸ See *Peer-Bearing Co.-Changshan v. United States*, 587 F. Supp. 2d 1319, 1325 (CIT 2008) ("Indeed, if the facts remained the same from period to period, there would be no need for administrative reviews" (quoting *Shandong Huarong Mach. Co. v. United States*, 29 C.I.T. 484, 491 (CIT 2005)).

¹⁸⁹ See section 773(c)(1) of the Act.

¹⁹⁰ See FG – 3rdSQR at 10-15.

¹⁹¹ See Fangda Group Verification Report at 14.

recipes accommodate the anticipated inclusion of the dregs from the last production run.¹⁹² The amount of these leftovers is standard to the tooling and does not change from batch to batch. Forming scrap is continuously reintroduced in the production of SDGEs. In fact, if one tracked inventory by the method first-in, last-out, the same forming scrap is used in every production run of the same recipe, considering that a recipe is filled out in the forming workshop by adding the forming scrap from the last production run of a recipe into the mixture called for by the recipe and there remains a similar quantity of forming scrap at the end of the production run. By this method, no forming scrap is consumed and there is no need to allow for a scrap offset or to add re-introduced forming scrap to the FOP buildup.

Fushun Jinly has a similar production process and has not reported re-introducing forming scrap or requested a forming scrap offset, nor have the petitioners argued for the necessity of applying a solution similar to the one proposed for the Fangda Group to Fushun Jinly.¹⁹³ We do not find it necessary to include a forming scrap offset or include re-introduced forming scrap in the FOP buildup of either mandatory respondent.

Comment 7: Claim for Silicon Carbide By-Product Offset (Fushun Jinly)

The petitioners argue the following:

- The Department should deny Fushun Jinly an offset for silicon carbide because Fushun Jinly failed to provide the Department with data regarding how much silicon carbide was produced.
- The Department will grant by-product offsets if two requirements are met: the producer/exporter “must document how much byproduct it made when producing subject merchandise” and “must show either that the byproduct was resold or that the scrap has commercial value and reentered the production process.”¹⁹⁴
- In *American Tubular Products*, the foreign producer who had attempted to claim an offset for steel scrap reported that it tracked only scrap sales, not production. The Court affirmed the Department’s decision not to grant the offset because the company “failed to meet the agency’s well-settled prerequisites to secure the deduction.”
- In this case, the silicon carbide output was reported by an unaffiliated toller, but Fushun Jinly confirmed that the toller only tracks sales information for silicon carbide, and not the production information.
- Because the reported quantities of silicon carbide were based on sales, rather than production, just as in *American Tubular Products*, there is no basis to grant Fushun Jinly an offset for silicon carbide by-product because the Department lacks the information needed to accurately calculate the offset for this by-product.

Fushun Jinly argues the following:

¹⁹² See Fangda Group Verification Report at Verification Exhibit 31.

¹⁹³ See Fushun Jinly’s June 30, 2015, section D questionnaire response Appendix D-2 at 1-2.

¹⁹⁴ See the petitioners’ Case Brief at 61 (citing *American Tubular Prods., LLC v. United States*, 38 CIT __, Slip Op. 14-116 (CIT 2014) (*American Tubular Products*) at 17 (citing *Arch Chems., Inc. v. United States*, 33 CIT 954, 956 (CIT 2009) (*Arch Chems., Inc.*)).

- The petitioners overstate the holding in *American Tubular Products*. While the Court in that case affirmed the Department’s rejection of an offset for steel scrap on the basis that the exporter in that case could not establish the amount of scrap produced, the Court also recognized that the Department could properly grant an offset to an exporter who did not track scrap production, if sales or inventory records reasonably established that the scrap stemmed from the production of subject merchandise.
- The Department will grant a by-product offset without the presence of production records if the exporter can demonstrate that the production of subject merchandise and sales of the by-product took place in the same period. When both production of the subject merchandise and sales of the by-product are reported on a monthly basis, the Department will reasonably assume that scrap sales are made in tandem with the production of the subject merchandise.¹⁹⁵
- The administrative record in this case is plainly distinguishable from the decision in *American Tubular Products*. In that case, the scrap sales information provided by the exporter could not reasonably be tied to the production of the subject merchandise (*i.e.*, the exporter could not corroborate that its scrap production and scrap sales were made during the same period). Here, the record establishes that the production of subject merchandise by Fushun Jinly’s toller and the sales of the silicon carbide by-product were reported on a monthly basis. The administrative record also confirms that the reported by-product quantities relate to merchandise under consideration because the record establishes that electrode graphitization (a production process from which silicon carbide emerges) is the main business of the tolling company.

Department’s Position: The courts have recognized that neither the statute nor the regulations require or prohibit subtracting from (or offsetting) the normal value with the revenue an exporter earns from selling manufactured by-products or scrap.¹⁹⁶ The Department’s practice with respect to by-product offsets is to allow such offsets based on the amount of by-product generated, once the by-product has been shown to have commercial value, through evidence of sales or reintroduction into the production process.¹⁹⁷ The AD questionnaire issued to Fushun Jinly in this review acknowledges that by-product/co-product offsets are only granted for merchandise that is either sold or reintroduced into production during the POR, “up to the amount of that by-product/co-product actually produced during the POR.”¹⁹⁸ The record of this review establishes that the silicon carbide by-product that emerged from the toller’s provision of the graphitization service to Fushun Jinly was sold during the POR.¹⁹⁹ In this review, Fushun Jinly provided monthly sales quantities of silicon carbide during the POR, as reported by one of Fushun Jinly’s

¹⁹⁵ See the respondents’ Rebuttal Brief at 54 (citing *Multilayered Wood Flooring from the People’s Republic of China: Final Determination of Sales at Less than Fair Value*, 76 FR 64138 (October 11, 2011) (*Wood Flooring from PRC*) and the accompanying Issues and Decision Memorandum at Comment 23).

¹⁹⁶ See *Arch Chems., Inc.*, at 956.

¹⁹⁷ 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) (*Valves from PRC*), and the accompanying Issues and Decision Memorandum at Comment 18.

¹⁹⁸ See Letter to the Department from Fushun Jinly, dated April 30, 2015.

¹⁹⁹ See FJ – 1stSQR1 at Appendix S1-D-64 and FJ – 2ndSQR2 at Appendix S2-32; see also Fushun Jinly Verification Report at 29 and Verification Exhibit 25.

graphitization tollers.²⁰⁰ Further, Fushun Jinly explained, and we verified, that the toller in question only tracks the sales information for silicon carbide, and not the production information.²⁰¹ Thus, the issue here is whether the reported monthly data for sales of silicon carbide can properly serve as the accurate proxy for the production data of this by-product and, thus, as the basis for the claimed offset. We find that the record evidence does not support such a conclusion.

In *American Tubular Products*, the case on which both the petitioners and Fushun Jinly rely, the Court affirmed the Department's denial of a steel scrap offset because the respondent did not track the production information and could not corroborate its claim that the amount of steel scrap it produced and sold were the same.²⁰² The Court specifically noted that "if an exporter does not record scrap production, the exporter may still claim the offset if it 'reasonably link[s]' the amount of scrap sold during the review period to the amount produced during the same time."²⁰³ The Court further stated that "{b}y demanding this proof, Commerce excludes scrap made during prior review periods from the offset formula, and ensures that NV reflects the actual cost of making subject goods."²⁰⁴ In the present case, as in *American Tubular Products*, there is nothing on the record that corroborates that the amount of silicon carbide sold during the POR equates to the amount of silicon carbide produced during the POR. Moreover, there is no record evidence that reasonably links the amount of silicon carbide sold during the POR to the amount of this by-product actually produced during the POR. Accordingly, consistent with *American Tubular Products* and the Department's past practice,²⁰⁵ we have denied Fushun Jinly's by-product offset for silicon carbide.

Furthermore, we find Fushun Jinly interpretation of *American Tubular Products* to be overly narrow. According to Fushun Jinly, under *American Tubular Products*, it is sufficient, for purposes of corroborating that the production and sales of silicon carbide were made during the same period, to simply establish that sales of silicon carbide stemmed from the production of SDGEs, and that such sales were made in tandem with the production of SDGEs. The overriding principle in *American Tubular Products* was, however, that a respondent must establish and support the amount of by-product or scrap it generates during the POR in order to meet the Department's "well-settled prerequisites for securing" an offset to normal value. Notwithstanding this, the Court noted in *American Tubular Products* that, absent documentation that tracks actual by-product production, the offset may, nevertheless, be warranted where record evidence reveals that the respondent produced and sold scrap on a monthly basis (*i.e.*, show that scrap was sold right after production), and that the scrap stemmed from the production of subject

²⁰⁰ See FJ – 1stSQR1 at Appendix S1-D-64.

²⁰¹ See FJ – 2ndSQR2 at 15 and Fushun Jinly Verification Report at 29.

²⁰² See *American Tubular Products*, at 17-19.

²⁰³ *Id.*, at 18 (citing *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 FR 13019 (February 26, 2013) (*SS Sinks from PRC*) and the accompanying Issues and Decision Memorandum at Comment 9) ("...we reviewed warehouse out-slips for certain production orders that showed the amount of stainless steel coil withdrawn for these orders exceeded the amount represented by the number of sinks in that order by a ratio that substantially supports the rate of scrap production claimed by Superte.").

²⁰⁴ *Id.*

²⁰⁵ See, *e.g.*, *Valves from PRC*, and the accompanying Issues and Decision Memorandum at Comment 18.

merchandise.²⁰⁶ The Court noted, however, that an offset will be denied where the sales data are “inadequate to estimate the true amount of scrap made in the manufacture of subject merchandise.”²⁰⁷ As we demonstrate below, we find that the sales data concerning sales of silicon carbide are inadequate as a proxy for the by-product’s production volume in connection with subject merchandise, because the record here does not suggest that the by-product was sold in the POR months in which it was generated (or immediately after the production of subject merchandise), or that this by-product was solely the result of producing subject merchandise.

The record does not support Fushun Jinly’s assertion that sales of silicon carbide stemmed solely from the production of SDGEs, or that such sales were made in tandem (or, more on point, commensurate) with the production of SDGEs. First, the record shows that Fushun Jinly’s unaffiliated toller graphitized a quantity of electrodes that substantially exceeds the quantity of graphitized semi-finished product that was consumed in the machining stage of SDGEs production, as Fushun Jinly reported in this review.²⁰⁸ From this fact (along with Fushun Jinly’s statement which implies the toller in question performs graphitization for producers other than Fushun Jinly²⁰⁹) it is reasonable to infer that the reported sales quantity of silicon carbide was produced not only from the graphitizing SDGEs but also from graphitizing large diameter graphite electrodes (LDGEs), and possibly other products, such as graphite blocks and rounds. The sales data provided by Fushun Jinly’s toller simply do not demonstrate whether (and in what proportion to the total) it was the graphitization of SDGEs (and not LDGEs, for example) in any given POR month that generated silicon carbide that was reported to have been sold in that month.

Second, even if Fushun Jinly’s toller only graphitized SDGEs (for Fushun Jinly and other producers), the record does not appear to suggest that sales of silicon carbide were made commensurate with the production of SDGEs. While the toller in question reported graphitization of electrodes in each month of the POR, sales of silicon carbide were made only in nine months of the POR.²¹⁰ More importantly, the sales ratio of silicon carbide per unit of output of graphitized electrode varies significantly among the various POR months. This suggests that, in certain POR months, sales of silicon carbide represented significantly more than that month’s production volume of the by-product, while in certain other POR months, sales of silicon carbide significantly lacked that month’s production volume of the by-product.²¹¹ Taken together, sales of silicon carbide in a time frame that represents 75 percent of the POR and the skewed pattern of monthly sales factors (*i.e.*, sales volume of the by-product per unit of electrode output) throughout the POR, undercut Fushun Jinly’s assertion that sales of silicon carbide were made

²⁰⁶ *Id.*, at 19 (citing *Multilayered Wood Flooring from the People’s Republic of China*, 76 FR 64318 (October 18, 2011) and the accompanying Issues and Decision Memorandum at comment 23).

²⁰⁷ *Id.*, at 20, FN. 8 (citing *Utility Scale Wind Towers From the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value*, 77 FR 75984 (December 26, 2012) and the accompanying Issues and Decision Memorandum at Comment 5).

²⁰⁸ Compare the POR quantity for “Graphitization semi-products output (MT)” in Table B in Attachment S1-D-45 of FJ – 1stSQR1 with the sum of consumption quantities for graphitized semi-finished products in Tables A-11 through A-16 in Appendix S2-12 of FJ – 2ndSQR2.

²⁰⁹ See FJ – 2ndSQR2 at 15 (“The quantity and value of the electrodes...tolled for producers...”).

²¹⁰ See FJ – 1stSQR1 at Appendix S1-D-45.

²¹¹ *Id.*

commensurate with the production of SDGEs, because the record disputes that the production and sale of silicon carbide were made during the same months of the POR or in comparable quantities. This factual scenario underscores precisely the sentiment expressed in *American Tubular Products* and highlights the inherent risk of relying on the sales data as an adequate gauge in estimating the actual amount of the silicon carbide generated in the production of SDGEs. Accordingly, we find that Fushun Jinly's reported sales data of silicon carbide are not sufficiently reliable to corroborate the production of silicon carbide during the POR. We, therefore, denied Fushun Jinly an offset for the silicon carbide by-product.

Comment 8: Valuation of Certain By-Products/Scrap Items (Fangda Group and Fushun Jinly)

The petitioners argue the following:

- With respect to the SV for scrap, the Department caps the value at the average value of the main inputs because "a by-product is by definition is less valuable than the input from which it is derived."²¹² In its preliminary results, the Department erred when valuing certain scrap offsets for the Fangda Group and Fushun Jinly by either not relying on a product-specific SV or by relying on a value that is higher than the average value of the main inputs.
- Concerning baking scrap, the SV that the Department used exceeds the value of the main inputs for both the Fangda Group and Fushun Jinly. In the preliminary results, the Department valued baking scrap using the value for HTS 2713.12 (calcined coke). For the Fangda Group, baking scrap's main inputs include needle coke, raw petroleum coke, calcined petroleum coke, raw coal tar pitch, modified coal tar pitch, metallurgical coke grain, and metallurgical coke powder. The Department must use the simple average of these individual SVs as the correct SV for baking scrap. For Fushun Jinly, baking scrap's main inputs include needle coke, raw petroleum coke, raw coal tar pitch, metallurgical coke grain, and metallurgical coke powder. The Department must use the simple average of these individual SVs as the correct SV for baking scrap.
- Concerning electrodes scrap, wasted powder, graphite scrap, and graphite powder for the Fangda Group and electrodes scrap and graphite powder for Fushun Jinly, the SV that the Department used for these by-products exceeds the value of the main inputs. In the preliminary results, the Department valued all these by-products using the value for HTS 3801.90 (preparations based on graphite). Electrodes scrap, wasted powder, graphite scrap, and graphite powder are merely parts, pieces, or powder of graphitized electrodes - they do not have the function or utility of a graphitized electrode and, therefore, they cannot have virtually the same commercial value as a complete electrode. For the Fangda Group, the primary inputs for electrodes scrap, wasted powder, graphite scrap, and graphite powder are the same as for baking scrap. Accordingly, the SV for baking scrap (as proposed above for the Fangda Group) should also serve as the correct SV for

²¹² See the petitioners' Case Brief at 62 (citing *Monosodium Glutamate From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and the Final Affirmative Determination of Critical Circumstances*, 79 FR 58326 (September 29, 2014) (*Monosodium Glutamate from PRC*) and the accompanying Issues and Decision Memorandum at Comment 11).

electrodes scrap, wasted powder, graphite scrap, and graphite powder for this respondent. Similarly, for Fushun Jinly, the primary inputs for electrodes scrap and graphite powder are the same as for baking scrap. Accordingly, the SV for baking scrap (as proposed above for Fushun Jinly) should also serve as the correct SV for electrodes scrap and graphite powder for this respondent.

- Concerning graphite mixed materials for the Fangda Group, the SV that the Department used for this by-product is not specific to the actual inputs. In the preliminary results, the Department valued this by-product using the value for HTS 3801.90 (preparations based on graphite). Graphite mixed materials' inputs include metallurgical coke powder and rough sand. The Department must use the simple average of these individual SVs as the correct SV for graphite mixed materials.
- Concerning baking mixed materials for the Fangda Group, the SV that the Department used for this by-product is not specific to the actual input. In the preliminary results, the Department valued this by-product using the value for HTS 2713.12 (calcined coke). Baking mixed materials' primary input is metallurgical coke powder. The Department must use the SV for metallurgical coke powder as the correct SV for baking mixed materials.
- Concerning silicon carbide for the Fangda Group and Fushun Jinly, the SV that the Department used for this by-product is not specific to the actual inputs. In the preliminary results, the Department valued this by-product using the value for HTS 2849.20 (carbides of silicon, chemically defined or not). Silicon carbide's main inputs include metallurgical coke powder and silicon sand. The Department must use the simple average of these individual SVs as the correct SV for silicon carbide.

The respondents argue the following:

- Section 773(c)(1) of the Act provides that, in non-market economy cases, the Department “shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise” and that the “valuation of the factors shall be based upon the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.”²¹³
- By valuing the FOPs for aforementioned by-products with a surrogate price of the by-product itself, the Department's SV methodology in the preliminary results was fully in accordance with the statute because a surrogate price used was specific to the by-product. The petitioners' proposed methodology of valuing a by-product's FOPs using the simple average of the surrogate prices of the raw material components of the by-product disregards the express language of the statute because a SV proposed is not specific to the by-product itself.
- The petitioners' methodology is totally inconsistent with the SVs the Department used in all of the previous administrative reviews under this order concerning these same by-products.

²¹³ See the respondents' Case Brief at 56 (citing section 773 (c)(1) of the Act).

- The sole case the petitioners cited, *Monosodium Glutamate from PRC*, is not concerned with the valuation of an FOP, but is concerned with the quantity produced of the reported by-product in relation to the quantity consumed of the primary input in the production of the by-product.
- In order for the Department to consider the valuation of an FOP with a surrogate price other than the one associated with by-product being valued, the party in favor of such a valuation would have to allege that either no SV, specific to the by-product, is present on the record, or the available SV for that by-product is aberrational or could not otherwise be used. The petitioners have made neither of these allegations.
- The petitioners' proposed methodology is unreasonable because it uses a simple average of the SVs for component inputs rather than a weighted average thereof. Use of a simple average distorts the proposed surrogate prices because it understates the high value of the major raw material components that account for the largest portion of the by-product's commercial value and overstates the low value of raw material components that account for the smallest portion of the by-product's commercial value.
- Because certain of the by-products of the production of SDGEs are also re-introduced as direct materials of SDGEs production, the petitioners' methodology introduces a double standard, in that the product that serves as a direct material input of SDGEs production is valued differently than the same product that serves as a by-product of SDGEs production.

Department's Position: Section 773(c)(1) of the Act requires that factor valuation shall be based on the best information available. When selecting the best information available for valuing FOPs, in accordance with section 773(c)(1) of the Act, it is our practice to select, to the extent practicable, SVs that are product specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and free of taxes and duties.²¹⁴ The Department has "wide discretion" to use the best available information to value FOP.²¹⁵ The courts recognized product specificity as one of the most important factors in the selection of the appropriate SV.²¹⁶

In order to address properly the petitioners' arguments concerning the appropriate valuation of the by-products/scrap offsets in question, it is necessary to identify which of the aforementioned items constitute by-products (whether simple or complex, value-added items) and which items constitute scrap. Such identification is required in order to institute the proper valuation

²¹⁴ 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, and *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.

²¹⁵ See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1322 (CAFC 2010).

²¹⁶ See *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"). See also *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.")

methodology, consistent with our practice, as discussed below. In this review, we find that baking scrap,²¹⁷ broken electrode (or, electrode scrap),²¹⁸ wasted powder,²¹⁹ graphite scrap,²²⁰ graphite powder,²²¹ and silicon carbide²²² are complex by-products because these items are the product of numerous, integrated, and dedicated production processes that consume a number of direct materials, labor, certain energy inputs, and manufacturing overhead. Conversely, baking mixed materials²²³ and graphite mixed materials²²⁴ are simply unused auxiliary materials (or, in case of graphite mixed materials, a mixture of unused auxiliary materials), that serve as agents required in the proper execution of specific production stages, baking/re-baking and graphitization, respectively.

The petitioners' argument, regarding capping the value of a by-product at the average value of the inputs that caused the emergence of the by-product, rests on a single case, *Monosodium Glutamate from PRC*. The petitioner's interpretation of the decision there, however, is misplaced. In *Monosodium Glutamate from PRC* the Department stated:

Where there is no evidence that the by-product is a value-added by-product, assigning a by-product a value that is higher than the value of the input from which it is derived is unreasonable. In this investigation, the quantity of the by-product reported exceeds the quantity of the primary input consumed in the production of that by-product. Thus the extended value of the by-product exceeds the extended value of the primary input. Therefore, in the instant investigation, the Department finds it appropriate and reasonable to cap the specific by-product quantity at the specific FOP input amount.²²⁵

Monosodium Glutamate from PRC suggests that our treatment of non-value-added by-products is akin to our treatment of scrap items. There is, however, a difference between these two approaches. For non-value-added by-products, we consider capping the output quantity of the by-product at the quantity of input from which the by-product is derived, when the record demonstrates that the extended value of the by-product exceeds the extended value of the

²¹⁷ According to the Fangda Group, baking scrap is the electrodes scrap from baking stages of production. See FG – 3rdSQR at 16.

²¹⁸ According to the Fangda Group, broken electrode is produced at the machining and graphitization stages. See the Fangda Group's June 24, 2015, Section D response (FG – DQR) at pages D-15 through D-16.

²¹⁹ According to the Fangda Group, graphite powder and wasted graphite powder is powder that's generated and collected at the machining stage. See FG – 3rdSQR at 16. See also FG – DQR at pages D-15 and D-16.

²²⁰ According to the Fangda Group, graphite scrap is blocks or pieces that do not constitute good electrode output and are collected at the graphitization and machining stages. *Id.*

²²¹ See footnote FN 222.

²²² According to the Fangda Group and Fushun Jinly, silicon carbide is the by-product of transforming a carbon structure of semi-finished formed product into a graphite structure of electrode at the graphitization stage. See FG – SDQR at Exhibits SD-1.1 through SD-1.5 and FJ – CDQR at Attachment D-2.

²²³ According to the Fangda Group, baking mixed materials are wasted metallurgical coke powder collected at the baking stages. See FG – 3rdSQR at 16.

²²⁴ According to the Fangda Group, graphite mixed materials is a mix of collected and unused materials, metallurgical coke powder and sand, which are initially put into the graphitization stage. See FG – 3rdSQR at 15.

²²⁵ See *Monosodium Glutamate* and the accompanying Issues and Decision Memorandum at Comment 11 (emphasis added).

input.²²⁶ This is in contrast to our practice in *Nails from the PRC* and *Wire Hangers from PRC* of capping the SV for scrap where it exceeds the SV of input from which scrap is derived.²²⁷ Here, baking scrap, broken electrode, wasted powder, graphite scrap, graphite powder, and silicon carbide are complex value-added by-products. Aside from our practice of identifying the SV that is the most specific to the by-product, we are not aware of any precedent, and the petitioners cited none, where we cap the chosen SV of a complex by-product at the values of inputs that created the by-product. In fact, we have rejected analogous arguments in the past. In *Citric Acid*, a high-protein corn by-product was generated as a result of the production of citric acid, which included, as inputs, corn, corn enzyme, sodium carbonate, sodium hydroxide, and steam – the SV for the by-product was not capped at the value of the input(s).²²⁸ Similarly, in the *Electrodes AR4*, the chosen SV for forming scrap, on the basis of HTS 2713.12 (calcined coke), was not capped (or disqualified as aberrational) even though it exceeded the extended value of all inputs that the Fangda Group reported as having been consumed in self-producing calcined coke.²²⁹ In affirming the *SDGEs AR4*, the Court of International Trade did not disagree with our reasoning that supported our choosing of the most specific HTS category to value the by-product.²³⁰

Notwithstanding this, even if, for the sake of argument, the aforementioned items may not warrant a designation of complex, value-added by-products and, thus, deserving of the analysis considered in *Monosodium Glutamate*, the record shows that the extended value for each of these by-products does not exceed the sum of the extended values for all material inputs, labor, energy inputs, and manufacturing overhead consumed in making the semi-finished or finished product at the point in the production process from which these by-products emerge.²³¹ On the basis of

²²⁶ *Id.*

²²⁷ See *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16 2008) (*Nails from PRC*) and the accompanying Issues and Decision Memorandum at Comment 12 (where the Department determined that the per-unit value for steel scrap produced from wire rod cannot be higher than the per-unit value of the wire rod itself) and *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 from PRC*) and the accompanying Issues and Decision Memorandum at Comment 7 (same determination as in *Nails from PRC*).

²²⁸ 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 the accompanying Issues and Decision Memorandum at Comment 7.

²²⁹ See *Electrodes AR4* and the accompanying Issues and Decision Memorandum at Comment 8 (“...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.”).

²³⁰ See *Fushun Jinly Petrochemical Carbon Co. v. United States*, 2016 Ct. Intl. Trade LEXIS 25 (CIT 2016).

²³¹ See the memorandum 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 2, 2016 (Fangda Group Preliminary Analysis Memorandum) at Attachment 4 (containing the output of SAS margin calculation program at page 56) (compare control number-specific total extended value for all by-products/scrap items combined to the total cost-of-manufacturing value) and the memorandum 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 Fushun Jinly Petrochemical Co., Ltd.,” dated March 2, 2016, at attachment (containing the output of SAS margin calculation program at page 26) (compare control number-specific total extended value for all by-products combined to the total

these explanations, we find no basis to cap the SVs for baking scrap, broken electrode, wasted powder, graphite scrap, graphite powder, and silicon carbide at the simple average of the individual SVs that we used to value the respective material inputs that were consumed and that caused the emergence of these by-products from the respective production processes.²³²

Concerning baking scrap by-product, there is no HTS category that is more specific to this form of scrapped semi-finished electrode. In the preliminary results, we valued baking scrap using the value for HTS 2713.12 (calcined coke) because this category captures (more closely than any other category) the primary inputs (needle coke and calcined petroleum coke) consumed in the production of this form of scrapped semi-finished electrode (*i.e.*, these raw materials were consumed in the production stages immediately preceding the baking stage from where the baking scrap by-product emerges). We find this approach consistent with how we valued the forming scrap by-product in the 2012-2013 administrative review of this order, discussed above, and conservative. Specifically, although baking and re-baking processes are further downstream from the forming process, the SV we used for baking scrap by-product is the same SV that we used to value forming scrap by-product in the 2012-2013 review (*i.e.*, HTS 2713.12 (calcined coke)).

In the *Preliminary Results*, we valued broken electrodes (or electrodes scrap), wasted powder, graphite scrap, and graphite powder by-products, using HTS category 3801.90. In reviewing the description for HTS 3801 (“artificial graphite; colloidal or semi-colloidal graphite; preparations based on graphite or other carbon in the form of pastes, blocks, plates or other semi-manufactures”), we find that the HTS category 3801.10 (“artificial graphite”) is more specific to the by-products in question than the HTS category 3801.90 (“other”) because the forms in which these by-products emerge meet the description of HTS category 3801.10.10 (*i.e.*, a subset of HTS category 3801.10) (“plates, rods, powder and other forms, wholly or partly manufactured...”). Accordingly, and because the Romanian GTA data are only available at the 6-digit classification, for the final results of this review, we relied on HTS category 3801.10 to value broken electrode (or electrodes scrap), wasted powder, graphite scrap, and graphite powder by-products.²³³

On June 8 and June 16, 2016, we placed on the record the information concerning the description of HTS category 3801.10 and POR import statistics for this category from the Global Trade Atlas, and invited comments, respectively.²³⁴ Both, the respondents²³⁵ and the petitioners²³⁶

cost-of-manufacturing value).

²³² It is also important to note that the petitioners’ suggested approach in this regard is overly simplistic and distortive in that 1) it does not take into account energy inputs, labor, and manufacturing overhead that accompanies the consumption of material inputs at each production stage, and 2) the simple averaging of the material inputs’ SVs neglects the respective consumption quantities of all inputs of production required to produce one unit of any given by-product.

²³³ See Memorandum to File, “Small Diameter Graphite Electrodes from the People’s Republic of China: Surrogate Factor Valuation for the Final Results,” dated September 2, 2016 (Final Surrogate Values Memo).

²³⁴ See Memorandum to File, “Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People’s Republic of China: Placement of Factual Information on the Record,” dated June 8, 2016, and letter to all interested parties, dated June 22, 2016 (setting the deadline for comments on this new factual information).

²³⁵ See the respondents’ submission, “Small Diameter Graphite Electrodes From China: Comments on Information

commented on this HTS category and the POR average unit value (AUV), and we duly considered parties' comments, as follows.

Specifically, the respondents commented that, in the event that the Department's final results incorporate import statistics for HTS 3801.10, it must value reintroduced graphite inputs and graphite by-products using the same SV. Further, the respondents commented that the adjusted AUV of import statistics under Romanian HTS 3801.10 is aberrational during the POR (*i.e.*, low) when compared to previous administrative review periods, on a historical basis; consequently, the Department must use the adjusted AUV for HTS 3801.10 of a different review period, or the simple or weighted average of subsequent and/or previous periods, or some other reasonable calculation.

The petitioners commented that the AUV for HTS 3801.10 is inappropriate for the same reasons advocated in their case brief (*i.e.*, the proposed value exceeds the average of the SVs of the inputs). In the alternative, the petitioners commented that the respondents failed to demonstrate that the POR AUV for Romanian HTS 3801.10 is aberrational "on a historical basis" – the respondents merely showed that the AUVs varied over time, with a generally declining trend since the 2009-2010 period. Thus, the petitioners commented, the respondents provided no evidence that the relatively lower AUV for imports in the current period is not consistent with the general behavior of commodity prices.

We agree with the respondents that the by-products in question should be valued the same when they are re-introduced as inputs of production. We also agree with the petitioners that the information the respondents provided does not establish that the AUV for imports under Romanian HTS 3801.10 for the POR is aberrational. Our analysis of interested parties' comments does not change our determination to rely in these final results on the HTS category 3801.10 to value broken electrode (or electrodes scrap), wasted powder, graphite scrap, and graphite powder by-products.

Concerning silicon carbide by-product, in the preliminary results, we valued this item using HTS category 2849.20 ("carbides of silicon, chemically defined or not"). We find the petitioners' argument (that this HTS category is not specific to the material inputs,²³⁷ metallurgical coke powder and silicon sand, from which silicon carbide is made) irrelevant. The HTS category 2849.20 is the most specific category to the by-product in question and no party in this review disputes this.

Concerning baking mixed materials and graphite mixed materials, we find that the valuation of these items should be analogous to how we valued scrap items in other cases. In *Nails from PRC* and *Wire Hangers from the PRC*, the Department capped the SV of scrap at the value of an input,

Placed on The Record By The Department on June 8, 2016," dated June 20, 2016.

²³⁶ See the petitioners' submission, "6th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China – Petitioners' Rebuttal to Respondents' June 20, 2016 Comments," dated July 7, 2016.

²³⁷ The petitioners also fail to identify that an energy input, electricity, is required in a massive quantity in the graphitization stage of SDGEs production from which silicon carbide emerges as a by-product.

wire rod.²³⁸ Here, baking mixed materials' primary input is metallurgical coke powder, while graphite mixed materials' primary inputs are metallurgical coke powder and rough sand. In the preliminary results, we valued baking mixed materials using the value for HTS 2713.12 (calcined coke) and graphite mixed materials using the value for HTS 3801.90 (preparations based on graphite). We find that these HTS categories, respectively, are not specific to the respective scrap items, or to material inputs that generated these scrap items. Accordingly, for the final results of review, we valued baking mixed materials scrap using HTS category 2704.00 ("Coke Etc Of Coal, Lignite Or Peat; Retort Carbon"), the same category we used to value metallurgical coke powder. Similarly, we valued graphite mixed materials using HTS categories 2704.00 and 2505.10 ("Silica Sands And Quartz Sands, Natural") (the same category we used to value rough sand). However, because the record does not illuminate the proportion of metallurgical coke powder and rough sand in the graphite mixed materials, we averaged the value for HTS 2704.00 with the value for HTS 2505.10.²³⁹

Comment 9: Date of Sale (Fangda Group and Fushin Jinly)

The petitioners argue the following:

- In this review, the Fangda Group and Fushun Jinly reported invoice date as the date of sale, which the Department preliminarily accepted.
- The exception to the use of invoice date as date of sale, however, should apply in the final results of this review. The Department may use a date other than the data of invoice if "different date better reflects the date on which the exporter or producer establishes the material terms of the sale."²⁴⁰ In *Saccharin from China*, the Department determined that the purchase order date was more appropriate as the date of sale because "there were no material changes to the essential terms of sale (quantity and price) between the purchase order date and the invoice date."²⁴¹
- Here, the material terms of sale were also set at the time of the purchase order. The record shows that sales quantities changed between the issuance of the purchase order and invoice, but such deviations were within the 10 percent tolerance bands specified in the purchase order. Therefore, because there are no material differences in quantity between the purchase order and the invoice, as the tolerance bands were set at the time of purchase order, the purchase order date is the correct date of sale and the date upon which the Department should rely in the final results.

The respondents argue the following:

²³⁸ See *Nails from PRC* and the accompanying Issues and Decision Memorandum at Comment 12, and *Wire Hangers from PRC* and the accompanying Issues and Decision Memorandum at Comment 7.

²³⁹ See Final Surrogate Values Memo.

²⁴⁰ See the petitioners' Case Brief at 67 (citing 19 CFR 351.401(i), *Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27349 (May 19, 1997), and *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-92 (CIT 2001) (*Allied Tube*)).

²⁴¹ See the petitioners' Case Brief at 67 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China*, 68 FR 27530, 27531 (May 20, 2003) (*Saccharin from China*)).

- Each and every purchase order on the administrative record has a different quantity and a different total sales value from those stated in the invoices for both respondents.
- The record shows that, while purchase orders from certain U.S. customer(s) contain the tolerance provision, purchase orders from certain other U.S. customers of both the Fangda Group and Fushun Jinly do not. In the latter instances, all purchase orders and invoices show large discrepancies in quantities sold and total sales values.
- The petitioners did not provide a sound reason for the Department to depart from its preferred method of using the date of invoice as the date of sale in this proceeding, which has been applied in each administrative review under the order.

Department's Position: In identifying the date of sale of the merchandise under consideration, we will normally, in accordance with 19 CFR 351.401(i), "use the date of invoice, as recorded in the exporter or producer's records kept in the normal course of business." In *Allied Tube*, the CIT noted that a "party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to 'satisfy' the Department that 'a different date better reflects the date on which the exporter or producer establishes the material terms of sale.'" ²⁴² Additionally, we may use a date other than the date of invoice if we are satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. ²⁴³ This normally includes the price, quantity, delivery terms and payment terms. ²⁴⁴

In this review, the Fangda Group and Fushun Jinly reported the invoice date as the date of sale, and consistent with 19 CFR 351.401(i), we preliminarily determined to use the invoice date as the date of sale. ²⁴⁵ For the final results of this review, we continue to find that the invoice date is the appropriate date of sale for both respondents. The regulations at 19 CFR 351.401(i) and the legal precedent established in *Allied Tube* make it clear that we will determine the date of sale on the basis on an invoice date, unless sufficient evidence is provided that satisfies us that a different date is controlling in establishing the material terms of sale. We find that the record evidence in this review is not sufficient or compelling to satisfy us that the date of the purchase order applicable to sales made by the Fangda Group and Fushun Jinly is the date on which the material terms of sale were established.

First, the Fangda Group and Fushun Jinly are correct in pointing out that, while certain of their U.S. customers specify a tolerance allowance in their purchase orders, other U.S. customers do not. ²⁴⁶ For U.S. transactions involving the latter set of customers, the record shows differences between the ordered and invoiced quantities. ²⁴⁷ Second, the overwhelming number of purchase orders on the record of this review indicate that the Fangda Group's and Fushun Jinly's U.S.

²⁴² See *Allied Tube* 132 F. Supp. 2d at 1090-1092 (quoting 19 CFR 351.401(i)).

²⁴³ *Id.*; see also, 19 CFR 351.401(i).

²⁴⁴ See, e.g., *Carbon and Alloy Steel Wire Rod From Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review*, 72 FR 62824 (November 7, 2007), and the accompanying Issue and Decision Memorandum at Comment 1; *Notice of Final Determinations of Sales at Less Than Fair Value; Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000), and the accompanying Issues and Decision Memorandum at Comment 1.

²⁴⁵ See *Preliminary Results* and the accompanying Preliminary Decision Memorandum at 12.

²⁴⁶ See, e.g., FG – AQR at Appendix A-5, and FJ – AQR at Appendix A-5.

²⁴⁷ *Id.*

customers' ordered quantity for SDGEs was representative of the maximum container-weight load and discreet counts thereof (*i.e.*, 20 MT (one 20' container), 40 MT (two 20' containers), 60 MT (three 20' containers), 100 MT (five 20' containers), etc.).²⁴⁸ In fact, some of these purchase orders also have references, in parenthesis, such as, for example, "appx." or "1 load" below the specified container weight count.²⁴⁹ Thus, the ordered quantity in the purchase orders was for an imprecise total weight of SDGEs sufficient to fill a container load. As a preliminary matter, while the purchase orders specify a tolerance allowance in the ordered weight, it is not clear what purpose the stated tolerance allowances fulfill. Specifically, the tolerance allowance specifies significant percent deviations (*i.e.*, plus or minus 10 percent) above and below the approximate ordered quantity – while it is logical that the shipped weight of SDGEs can be less than the maximum container load (as demonstrated in the record), it is not possible that it can be more. We find that the purchase orders merely serve to establish a firm range of ordered quantity, and not the specific and firm quantity of sale, as contemplated by 19 CFR 351.401(i). This conclusion is supported by the explanation that Fushun Jinly provided in this review:

The actual merchandise quantity for each electrode can be determined only after production is completed. It is not possible to pack the exactly {sic} weight of merchandise as indicated in the purchase order or the purchase contract.²⁵⁰

We find this explanation credible and informative, because the weight of an electrode (and, thus, the entire order) is a function of an electrode's density, which can only be known after the production of an electrode is completed. The electrode's density, in turn, is a function of the precise mix of raw materials and certain production stages' processing times. Accordingly, the precise and actual quantity of merchandise sold can only be determined when the merchandise is shipped and invoiced, upon completion of production, whereas the ordered quantity in the purchase order is merely a rough estimate. The circumstances present here (*i.e.*, approximate ordered quantity with a wide tolerance allowance) is in stark contrast to the precedent where we relied on the purchase order as the date of sale (where the ordered quantity is a precise number and the tolerance allowance is typically tight, *i.e.*, 2 to 3 percent).²⁵¹ On the basis of the foregoing rationale, for the final results of this review, we rely on the invoice date as the date of sale for both respondents.

Comment 10: Tolling Data (Fangda Group)

The petitioners argue the following:

- In the *Preliminary Results*, the Department applied neutral facts available to establish the FOPs missing from the record for the Fangda Group's uncooperative unaffiliated tollers.

²⁴⁸ See FG – SACQR at Appendices S1-12 to S1-15, and FJ – 1stSQR2 at Appendices S1-A-6 to S1-A-9, S1-A-16, S1-A-19, and S1-A-27.

²⁴⁹ *Id.*

²⁵⁰ See FJ – 1stSQR2 at 15.

²⁵¹ See, *e.g.*, *Certain Cut-to-Length Carbon-Quality Steel Plate Products From Italy: Final Results of Antidumping Duty Administrative Review*, 75 FR 47777 (August 9, 2010) and the accompanying Issues and Decision Memorandum at Comment 1.

- The petitioners disagree with the Department’s contention that the “non-reporting tollers account for a relatively small portion of the total FOPs during the POR”²⁵² and cite production stage specific percentages of tolled production with data drawn from a worksheet provided by the respondent that, in their opinion, represents a “large share” of production.
- The Department is missing FOP information from what it concedes are a large number of the Fangda Group’s unaffiliated tollers and the Fangda Group concedes that most of the unaffiliated tollers refused to provide FOP data. Only four unaffiliated tollers for Chengdu Rongguang provided data, but refused to be verified by the Department. While the Fangda Group claims it attempted to obtain FOP data from its tollers, it should not be rewarded given that most tollers failed to cooperate, given the number of segments of this proceeding in which the Fangda Group has been under examination. Therefore, the Department should continue to apply facts available to the Fangda Group’s uncooperative tollers, but the FOP data used as facts available should be the highest relevant FOPs available on the record across responses of the mandatory respondents and tollers.²⁵³
- Applying the highest FOPs on the record will create the right incentives for developing a fuller record in future reviews.

The Fangda Group argues the following:

- The Fangda Group cooperated with the Department by providing its own data and data from its affiliated tollers for the FOPs associated with production steps performed by the unaffiliated tollers. For this reason, the application of AFA would be unduly punitive and contrary to the statutory provision for the application of an adverse inference because the Fangda Group acted to the best of its ability to provide sufficient information to the Department from sources under its control. Consistent with the Department’s findings in previous administrative reviews on this matter, in the *Preliminary Results*, the Department appropriately declined to use AFA and rather used neutral facts available because it did not find that the Fangda Group failed to cooperate.
- As in all previous administrative reviews, the Fangda Group contacted all of its unaffiliated tollers to ask them to report their FOPs to the Department, and reported the communications and responses to the Department. All but four unaffiliated tollers refused to provide their FOPs to the Fangda Group or its counsel. The four unaffiliated tollers who agreed to provide FOP data refused to allow verification of their data. The Fangda Group argues that these companies declined to provide their FOP data because the Fangda Group does not control these companies, the tollers are not obligated to provide their information, and that they declined because they believe that the Fangda Group will use this information against them in future commercial negotiations on processing fees.

Department’s Position: The record reflects that the Fangda Group fully cooperated in this review

²⁵² See the petitioners’ Case Brief at 68 (citing *Preliminary Results* and the accompanying Decision Memorandum at 20.)

²⁵³ The Fangda Group’s own FOPs and, where applicable, the FOPs of the toller that the Fangda Group submitted voluntarily for the production step that was outsourced in its entirety.

by providing all the information reasonably available to it concerning the tolled inputs of production. As we have previously stated, the “best of its ability” standard from *Nippon Steel* does not apply to the Fangda Group’s tollers, but rather, to the Fangda Group, itself.²⁵⁴ The Fangda Group identified its tollers in response to the Department’s request and documented its unsuccessful attempts to obtain the requested toller FOPs.²⁵⁵ Because the Fangda Group does not control its unaffiliated tollers, it can only ask, and not compel, them to supply this information. Moreover, we do not consider toller non-compliance to be a failure to comply with a Department request for information by the Fangda Group. Accordingly, we did not request that the Fangda Group make attempts beyond those it reported to obtain data from unaffiliated tollers. For these reasons, as Fangda Group correctly argues, an application of AFA is not warranted. Nevertheless, because necessary information is not available on the record with respect to FOP data for tollers, consistent with our practice,²⁵⁶ we are continuing to apply neutral facts available in these final results, for the reasons explained below.

As we explained in the *Preliminary Results*, during this POR, the Fangda Group used a number of unaffiliated tollers to perform a portion of the production in most of the production stages for merchandise under consideration.²⁵⁷ Unlike in prior administrative reviews under this order, in this administrative review we did not limit our request for tollers’ data to a select subset of the tollers involved in the production of merchandise under consideration. This allowed us to expand the net of possible toller responses to its maximum extent, compared to past administrative reviews. Casting this larger net, however, resulted in virtually the same outcome as in prior reviews, *i.e.*, no unaffiliated toller reported data which it would allow to be verified.²⁵⁸ Specifically, the Fangda Group reported that it was unable to obtain the requested information from all but four unaffiliated tollers and those tollers would not permit verification. For these reasons, there is no useable information from any unaffiliated tollers on the record.²⁵⁹ As a result, we lack necessary FOP data and the application of “facts otherwise available” is warranted.

The fact pattern present in this review and our decision to rely on neutral facts available for

²⁵⁴ See *Electrodes AR4* and the accompanying Issues and Decision Memorandum at Comment 6 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (CAFC 2003) (*Nippon Steel*)).

²⁵⁵ See FG – DQR at Appendix D-13.

²⁵⁶ 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 the accompanying Issues and Decision Memorandum at Comment 12; see also, *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 (September 13, 2011) and the accompanying Issues and Decision Memorandum at Comment 9, 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 AR1*); *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 AR3*) and the accompanying Issues and Decision Memorandum at Comment 2; and *Electrodes AR4* and the accompanying Issues and Decision Memorandum at Comment 6.

²⁵⁷ See *Preliminary Results* and the accompanying Preliminary Decision Memorandum at 20-21; see also Fangda Group Preliminary Analysis Memorandum at pages 10 through 11.

²⁵⁸ See, e.g., *Electrodes AR4* and the accompanying Issues and Decision Memorandum at Comment 6.

²⁵⁹ See FG – DQR at page D-4.

missing FOP data for tollers is similar to that in *Photovoltaic Cells from the PRC*.²⁶⁰ In *Photovoltaic Cells from the PRC*, as neutral facts available, we relied on the respondent's reported FOP data for the same processing that was performed by non-reporting tollers in place of the missing data from tollers. The rationale we provided was 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."²⁶¹

For these final results, we maintain our assertion stated in the *Preliminary Results* that, contrary to the petitioners' assertions, the proportion of production activity handled by tollers is relatively small.²⁶² Specifically, the proportions of production-stage specific²⁶³ group-wide tolled output²⁶⁴ to stage-specific group-wide total output that the petitioners relied on to make their claim are drawn from a worksheet provided by the Fangda Group that is based on incomplete information.²⁶⁵ This worksheet provides individual factory production quantities by stage for tolled and un-tolled production with respect to merchandise under consideration. In this worksheet, however, the Fangda Group reported group-level ratios of tolled production²⁶⁶ to total production of the manufacturing units which used tolling and, therefore, did not include in the denominator of the stage-specific ratio calculations, the production quantities of factories within the Fangda Group which used no tolling services.²⁶⁷ Because we treat the individual companies²⁶⁸ within the Fangda Group as a single entity, pursuant to 19 CFR 351.401(f)(1), we find that it is appropriate to aggregate the toller data for the Fangda Group as a whole. For this reason, the data that the petitioners relied on to claim that the outsourced production represents a "large share" of group production has no foundation. Accordingly, for these final results, we continue to find that it is more appropriate to rely upon the stage-specific ratios of tolled production to the total group-wide production that we calculated in the *Preliminary Results*.²⁶⁹ These ratios include all production of merchandise under consideration in the denominator of the ratio calculation and, therefore, yield results for the Fangda Group as a whole rather than for the subset of tolled companies' involvement at each stage. Using these data, we are able to determine that the tolled production represents a relatively small proportion of total production.²⁷⁰

²⁶⁰ 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 the accompanying Issues and Decision Memorandum at Comment 19; see also *Electrodes AR4*, and the accompanying Issues and Decision Memorandum at Comment 6.

²⁶¹ *Id.*

²⁶² See Fangda Group Preliminary Analysis Memorandum at 10-11.

²⁶³ Stage identifies individual production steps, e.g., by first baking step or by the graphitization step.

²⁶⁴ The total amount of stage specific production of the Fangda Group.

²⁶⁵ See FG – SDQR at Appendix SD-9. (This worksheet provided by the Fangda Group, and which the petitioners relied on to make their arguments here is incorrect. In this worksheet the Fangda Group did not include the production of manufacturing units which did not use any tolling in the denominator of the ratio calculations. In other words they divided by the amount of production of all units which used tolling not of **all** units when calculating the production stage-specific percentages of tolled output.)

²⁶⁶ The total tolled production of the Fangda Group.

²⁶⁷ *Id.*

²⁶⁸ These companies are Beijing Fangda, Chengdu Rongguang, Fangda Carbon, Fushun Carbon, and Hefei Carbon.

²⁶⁹ See Fangda Group Preliminary Analysis Memorandum at 10-11.

²⁷⁰ See *id.* at Attachment 1.

Accordingly, for the final results of this review, consistent with our past practice, we are continuing to apply, as neutral facts available, the Fangda Group's own FOPs to value FOPs that the Fangda Group's unaffiliated tollers were unwilling to provide (or provided, but for which the unaffiliated tollers would not permit verification) where the Fangda Group performed the remaining portions of the processes that were partially outsourced, as well as FOPs from an affiliated troller for a certain other production step.

Comment 11: VAT Adjustment Calculation (Fangda Group)

The petitioners argue the following:

- The Fangda Group reported incurring value-added tax (VAT) on inputs consumed in production that are not refunded at the time of export, and that the VAT refund rate applicable to SDGEs is 0.00.
- For certain sales, the Fangda Group reported irrecoverable VAT by dividing the FOB sales price by 1.17 times 0.17 percent. For the remaining EP sales with DDP terms of sale, for which the Fangda Group paid post FOB movement expenses and duties, the Fangda Group calculated reported irrecoverable VAT by multiplying the net price by the VAT rate where the net price was calculated by subtracting international freight, marine insurance, inland freight from the warehouse to the unaffiliated customer in the United States, customs duty in the United States, and the AD cash deposit in the United States from the gross price.
- For transactions with DDP terms of sale, the Department modified the Fangda Group's method to first calculate FOB based on the entry value, and then calculate the VAT based on the method used for the other sales. The verification sales traces indicate that the recalculated VAT amounts for these sales are incorrect, because the VAT amounts are not calculated on an FOB value for the U.S. sales but, instead, on the total U.S. sales invoice values.
- The petitioners provided a table in which they calculated the understatement of irrecoverable VAT. First, they calculated the gross RMB value of the transaction by summing the total electrode value in RMB sourced from the sales ledger and adding this to the total VAT amount in RMB, which was calculated as 17 percent of the gross value, and these values tie to the sales tax payable entries, where available on the record. Next, they converted this gross RMB amount to dollars by dividing the gross amount by the daily USD: RMB exchange rate. Next, they calculated per-unit irrecoverable VAT by dividing the USD gross value of the sales by the sale's quantity. Finally, they determined the amount of underreported irrecoverable VAT payable by subtracting the amount of such tax reported in the sales database from their calculated per unit amount.
- For the final results, the Department should find that the Fangda Group failed to report accurately in field VATTAXU the irrecoverable VAT on the above-noted U.S. sales to allow the Department to reduce "the gross U.S. price charged to the customer to a tax neutral net price received by the seller."²⁷¹ For the final results, the Department should

²⁷¹ See the petitioners' Case Brief at 72 (citing *Seamless Refined Copper Pipe and Tube From the People's Republic*

assign the highest per-unit VAT TAXU to each of the above-noted U.S. sales as an adverse inference, in response to Fangda Group's misleading conduct on this issue.

The Fangda Group argues the following:

- No adjustment is necessary in the final results to properly account for VAT on Fangda Carbon's DDP sales.
- The Fangda Group's export sales are subject to VAT based on changes to Chinese VAT regulations promulgated in *Circular 52*, such that "the merchandise that are not rebated upon export shall be deemed as those sold in domestic markets, upon which the value-added tax and consumption tax shall be levied."²⁷²
- The State Administration of Taxation of the PRC provides that the VAT refund rate applied to the subject merchandise under customs code 85451100 and 85451900 is 0.00 percent.²⁷³
- The Fangda Group's calculation of VAT for sales with DDP terms of sale and its accounting entries were fully in compliance with Chinese laws and regulations, which require VAT to be calculated on a FOB value for export sales, *i.e.*, "VAT-out = (FOB price of exported goods — value of bonded raw materials) / (1 + applicable tax rate) * applicable tax rate," rather than the total U.S. sale invoice value.²⁷⁴ The Department adopted this method in its *Preliminary Results*.
- The Fangda Group calculates and books VAT-out for domestic sales based on the sales value in VAT special invoices. In its accounting system, the Fangda Group booked VAT-out based on the invoice value for all sales. For DDP sales, the VAT-out payable amount has to be adjusted once international movement expenses are billed by the providers, these adjustments are booked as negative credits in the sales tax ledger or recorded as debits to VAT-in Payable. The Fangda Group provided an example of a negative credit entry for a marine insurance payment in the June 2014 sales tax payable ledger collected as part of the Fangda Group Verification Exhibit 15.

Department's Position: Our practice when calculating EP and constructed export price (CEP) is to include an adjustment of any un-refunded (herein irrecoverable) VAT in certain non-market economies, in accordance with section 772(c)(2)(B) of the Act.²⁷⁵ When a non-market economy

of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 32087 (June 5, 2015) and the accompanying Issues and Decision Memorandum at Comment 1).

²⁷² See the respondents' Rebuttal Brief at 64 (citing the "Circular of the Ministry of Finance, the State Administration of Taxation of the People's Republic of China, on Some Tax Issues Concerning the Export of Commodities with No Tax Refund or Lowered Tax Refund Rate by Manufacturing Enterprises" *Cai Shui* (2004) No. 52 (*Circular 52*), Article II, found in Fushun Jinly's October 6, 2015, supplemental response at Appendix S1-A-24).

²⁷³ See the respondents' Rebuttal Brief at 64 (citing the State Administration of Taxation of the PRC website information, found in FG – CQR at Appendix C-36).

²⁷⁴ See the respondents' Rebuttal Brief at 64 (citing "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," *Cai Shui* (2012) No. 39 (*Circular 39*), Item 1, Article 2, Chapter 7, found in FG – CQR at Appendix C-3).

²⁷⁵ 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 36483 (June 19, 2012).

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, we reduce the respondent's EP and CEP prices accordingly, by the amount of the tax, duty or charge paid, but not rebated.²⁷⁶ Where the irrecoverable VAT is a fixed percentage of EP, we arrive at a tax neutral dumping comparison by reducing the EP downward by this same percentage.²⁷⁷ Two steps are required to complete this task: (1) determining the irrecoverable VAT tax on subject merchandise; and (2) reducing U.S. price by the amount (or rate) determined in step one.

In these final results, we have continued to use the Fangda Group's reported per-unit irrecoverable VAT reported in the U.S. sales database, as verified.²⁷⁸ In the PRC, the entire 17 percent VAT on the FOB price is not refundable on electrodes. We agree with the Fangda Group that its calculation methodology is in line with Chinese regulations on the matter, as well as ours. It is clear from record evidence that the Fangda Group initially books VAT payable at 17 percent of the total invoice price. The relevant Chinese tax regulations cited by the respondent do not call for VAT payable on international movement expenses; rather, they stipulate that the tax base is the actual FOB price. Specifically, *Circular 39* at Article 4, Item 1 states that:

{t}he tax base for VAT Refund (Exemption) on a product or service... exported by a production enterprise shall be the actual FOB price of the exported product or service. The actual FOB price shall be subject to the FOB price indicated on the export invoice, provided that the competent tax authority shall be entitled to verify and determine the price if the export invoice is unable to reflect the actual FOB price.²⁷⁹

The Fangda Group's commercial invoices for DDP sales do not indicate FOB prices; rather, they state the total price to the unaffiliated customer in the United States and, therefore, include international movement expenses.²⁸⁰ For these reasons, the Fangda Group first books VAT payable based on the commercial invoice price inclusive of unnecessary accruals for VAT payable on the amount of the invoice related to international movement expenses and then adjusts VAT payables down to compensate for the over accrual.²⁸¹ Given that the irrecoverable VAT is calculated on an FOB basis, international movement expenses billed by Chinese service providers, e.g., freight and marine insurance providers, on export sales incurred after the goods are aboard ship is still refundable and, therefore, the total accrual for VAT payable calculated on the full value of the commercial invoice that includes expenses incurred after lading the goods aboard an ocean vessel is overstated.²⁸² Additionally, no VAT is charged by foreign providers of international movement services and any accrual of VAT payable on these services is

²⁷⁶ *Id.*, and *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 the accompanying Issues and Decision Memorandum at Comment 5.A.

²⁷⁷ *Id.*

²⁷⁸ See FG – 3rdSQR at Appendix S3-2 (sales database), FG – ACSQR at Appendix s1-32 and Fangda Group Verification Report Exhibits 11 through 19.

²⁷⁹ See *Circular 39* at Article 4, Item 1 (found in FG – CQR at Appendix C-3).

²⁸⁰ See, e.g., Fangda Verification Report at Verification Exhibits 17, 19 for commercial invoice examples. See also, FG – 3rdSQR at 9.

²⁸¹ *Id.* See also, respondents Rebuttal Brief at pages 65 through 66.

²⁸² See *Circular 39* at Article 4, Item 1 (found in FG – CQR at Appendix C-3).

unnecessary.²⁸³

The Fangda Group provided an example of an offsetting entry to VAT payable (*i.e.*, a negative credit to sales tax payables), to support its argument that it books offsetting entries to VAT payable to reduce the VAT payable amount from the commercial invoice based amount of VAT payable to the FOB based amount.²⁸⁴ The Fangda Group, however, did not state which transaction this negative credit supported, but cited it as an example of the existence of offsetting VAT transactions from the only month of the sales tax payable ledger on the record. The transaction in question is for a supplier of marine insurance used by the Fangda Group for exports to the United States, as supported by verification exhibits.²⁸⁵ Additionally, the one month of the sales tax payable ledger on the record contains numerous negative credits of the same type as this one.²⁸⁶ Because the Fangda Group's reported methodology reflected Chinese tax regulations, we used Fangda Group's calculated irrecoverable VAT amount in the *Preliminary Results*. Accordingly, we did not delve into the offsetting (*i.e.*, the negative credits in the sales tax payable ledger) transactions at verification with respect to the Fangda Group's few DDP sales. For these reasons, the record does not contain any traces of this type of offsetting entry to sales tax payable. Accordingly, we find that the Fangda Group's reported VAT amount to be accurate and we have, therefore, not made changes to the reported values for the final results of this review.

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 ☐


Paul Piquado

Assistant Secretary

for Enforcement and Compliance

2 SEPTEMBER 2016
(Date)

²⁸³ See, e.g., Fangda Group Verification Report at Verification Exhibit 17, at page 28.

²⁸⁴ See the respondents' Rebuttal Brief at 66.

²⁸⁵ See, *i.e.*, Fangda Group Verification Report at 23, and Verification Exhibit 17, at page 12 (Peoples Insurance Company of China, *a.k.a.* PICC).

²⁸⁶ Some negative credit entries in this ledger are obviously reversals which are unrelated to the transactions in question. There are dozens of transactions of the type identified by the Fangda Group. See Fangda Group Verification Report at Verification Exhibit 15, at pages 14 through 28. Additionally, Verification Exhibit 15 is not a DDP sale, however it contains the one month of the sales tax payable ledger that is available on the record.