Calgon Carbon Corp. et al. v. United States

Consol. Court No. 14-00326, Slip Op. 16-4 (CIT January 20, 2016)

FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce ("the Department") has prepared these final results of redetermination pursuant to the remand order of the Court of International Trade ("CIT" or "Court") in *Calgon Carbon Corp. et al. v. United States et al.*, Consol. Court No. 14-00326, Slip Op. 16-4 (CIT January 20, 2016) ("*Remand Opinion and Order*"). These final remand results concern *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 70163 (November 25, 2014) ("*AR6 Final Results*"), and the accompanying Issues and Decision Memorandum ("IDM"). On remand, the CIT ordered the Department to reconsider the surrogate value ("SV") for anthracite coal and to assign Shanxi DMD Corporation ("Shanxi DMD") a separate-rate.[1]

As set forth in detail below, pursuant to the CIT's *Remand Opinion and Order*, we have reconsidered the SV for anthracite coal and, under respectful protest,[2] we assigned Shanxi DMD a separate rate. Consequently, for the purposes of these results on remand, the Department has

[1] *See Remand Opinion and Order* at 14. Although the CIT ordered that the Department, "on remand, shall assign Shanxi DMD the all-others rate," *id.*, we note that in non-market economy ("NME") proceedings, companies not selected for individual examination but that otherwise satisfy the criteria for separate rate status receive a "separate rate." *See, e.g., AR6 Final Results*, 79 FR at 70164 (explaining how rate for non-examined separate rate respondents was calculated in underlying final results of review).

[2] *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

made changes to the mandatory respondents'[3] margin calculations, as well as recalculated the margin for the separate rate companies, the entries of which are subject to this litigation.[4]

B. REMANDED ISSUES

1. SV for Anthracite Coal

Background

In the *AR6 Preliminary Results*[5], the Department valued the respondents' anthracite coal input using contemporaneous Global Trade Atlas ("GTA") import data from the Philippines, the primary surrogate country, under harmonized system ("HS") code 2701.11 "Anthracite Coal, Not Agglomerated."[6] In the *AR6 Final Results*, the Department determined that information on the record demonstrates that a significant portion (*i.e.*, 94 percent) of the contemporaneous Philippine GTA import data under HS code 2701.11 "Anthracite Coal, Not Agglomerated" are not bulk anthracite coal, but rather a processed anthracite product, that is unsuitable for valuing the respondents' anthracite coal input.[7] For the *AR6 Final Results*, the Department valued respondents' anthracite coal input using the anthracite coal SV from the fifth administrative review, inflated to the sixth review period,[8] noting that in that review, the Department found that

[3] Jacobi Carbons AB's ("Jacobi") and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd.'s ("Cherishmet") (collectively, "mandatory respondents")

[4] *See* Memorandum to the File, through Catherine Bertrand, Program Manager, Enforcement and Compliance, Office V, from Bob Palmer, Case Analyst, Enforcement and Compliance, Office V, re: "Remand Redetermination Analysis Memorandum for Jacobi Carbons AB in the Antidumping Duty Review of Certain Activated Carbon from the People's Republic of China," dated April 6, 2016 ("Jacobi Remand Memo"); *see also*, Memorandum to the File, through Catherine Bertrand, Program Manager, Enforcement and Compliance, Office V, from Bob Palmer, Case Analyst, Enforcement and Compliance, Office V, re: "Remand Redetermination Analysis Memorandum for Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. in the Antidumping Duty Review of Certain Activated Carbon from the People's Republic of China," dated April 6, 2016 ("Cherishmet Remand Memo").

[5] *See Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 29419 (May 22, 2014) ("*AR6 Preliminary Results*") and accompanying Preliminary Decisions Memorandum ("PDM").

[6] *See* Memorandum to the File, through Catherine Bertrand, Program Manager, Enforcement and Compliance, Office V, from Emeka Chukwudebe, Case Analyst, Enforcement and Compliance, Office V, re: "Sixth Administrative Review of Certain Activated Carbon from the People's Republic of China: Surrogate Values for the Preliminary Results," dated May 16, 2014, at 4.

[7] *See AR6 Final Results* and IDM at 34-36.

[8] *Id.* at 37-38.

Philippine GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" was specific to the input, publicly available, tax and duty free, and that the Department has a preference of deriving SVs from the primary surrogate country.[9]

Although the CIT upheld the Department's determination that the AR6[10] Philippine GTA import data for anthracite coal were not specific to the input used by the respondents,[11] Petitioners[12] also argued that the Department should have relied on AR6 contemporaneous SV data from other countries found to be economically comparable to the People's Republic of China ("PRC"), and challenged the Department's preference of selecting SVs from a single surrogate country.[13] Petitioners contended that because the average unit value of anthracite coal undergoes "significant fluctuations" year-to-year, it is even more important for the Department to select a period of review ("POR")-contemporaneous value rather than trying to select all SVs from the same surrogate ME country, the Philippines.[14] The Court held that the Department placed too much emphasis on its regulatory preference at 19 CFR 351.408(c)(2) of valuing all factors from a primary surrogate country, which "carries the day only when it is used to 'support a choice of data as the best available information where the other available data upon a fair

[9] *See id.*; *see also*19 CFR 351.408(c); *Clearon Corp. v. United States*, Slip Op. 13-22 at 27 (CIT 2013) (acknowledging that the Department's preference is reasonable because "deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations"); *Bristol Metals L.P. v. United States*, 703 F. Supp. 2d 1370, 1374 (CIT 2010); *see also Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 26748 (May 8, 2013), and accompanying PDM at 25, unchanged in *Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012*, 78 FR 70533 (November 26, 2013), and accompanying IDM ("*AR5 Carbon*").

[10] The use of "AR" followed by a number in these remand results refers to a specific administrative review of the antidumping duty order of activated carbon from the PRC. Here, "AR6" refers to the sixth administrative review, which is the subject matter of the instant litigation.

[11] *See Remand Opinion and Order* at 16-20.

[12] Calgon Carbon Corp. and Cabot Norit Americas ("Petitioners").

[13] *Id.* at 20-21.

[14] *Id.*

comparison, are otherwise seen to be fairly equal.'"[15] Given the Department's emphasis on its regulatory preference, the Court determined that the Department, "by relying on its single surrogate country preference and nothing more, improperly rejected other SVs for anthracite coal derived from POR6-contemporaneous data from other countries."[16] Furthermore, the Court explained that the AR5 Philippine GTA import data cannot be considered "fairly equal" to the other AR6 anthracite SVs because it is not contemporaneous, and that the AR5 Philippine GTA data "may not be as reliable as some of the POR6-contemporaneous GTA data from other countries" because "{t}here is no supporting data on the record of this review for the POR5-contemporaneous Philippine value."[17] The Court also held that the Department never addressed the reliability of the contemporaneous SVs from Colombia, Indonesia, South Africa, Thailand, or Ukraine.[18] Therefore, the Court remanded the SV selection for anthracite coal to the Department for reconsideration, and, in doing so, directed that the Department should also carefully consider parties' arguments in this litigation regarding the reliability of the anthracite coal SV data from Colombia, Indonesia, and Thailand.[19]

Analysis

In accordance with the *Remand Opinion and Order*, and for the reasons set forth below, the Department finds that Thai HS code 2701.11: "Anthracite Coal, Not Agglomerated" is the best available information to value the mandatory respondents' anthracite coal input.

In a non-market economy proceeding, such as in this case, section 773(c)(1) of the Tariff Act of 1930, as amended ("the Act"), instructs the Department to value the factors of production

[15] *Id.* (quoting *Peer Bearing Co.-Changshan v. United States*, 804 F. Supp. 2d 1337, 1353 (CIT 2011)) (internal citations omitted).
[16] *See Remand Opinion and Order* at 22.
[17] *Id.*
[18] *Id.* at 22.
[19] *See Remand Opinion and Order* at 24-25 and n.17.

("FOPs") based upon the best available information from a market-economy country or countries that the Department considers appropriate. When considering what constitutes the best available information, the Department considers several criteria, including whether the SV data are contemporaneous, publicly available, tax and duty exclusive, represent a broad market average, and specific to the input.[20] There is no hierarchy for applying the above-stated principles.[21] The Department's preference is to satisfy the breadth of the aforementioned selection criteria.[22] Moreover, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs.[23] The Department must weigh the available information with respect to each input value and, on a case-by-case basis, make a product-specific decision as to what constitutes the "best" available SV for each input.[24]

The record contains five potential sources in addition to AR5 Philippine GTA import data that may be used to value the mandatory respondents' anthracite coal: GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" from (1) Colombia; (2) Indonesia; (3) South Africa; (4) Thailand, and (5) Ukraine.[25] We examined each source in turn.

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[20] *See e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006) ("*Lined Paper*"), and accompanying IDM at Comment 3.

[21] *See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006) ("*Mushrooms*"), and accompanying IDM at Comment 1.

[22] *See, e.g., Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 51940, 51943 (August 19, 2011), ("*Shrimp 2011*"), and accompanying IDM at Comment 2.

[23] *See Mushrooms*, and accompanying IDM at Comment 1; *see also Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002), and accompanying IDM at Comment 2.

[24] *See, e.g., Mushrooms*, and accompanying IDM at Comment 1.

[25] Given that the Court has agreed that the AR6 Philippine GTA import data for anthracite coal were not specific to the input used by the respondents, we are not re-considering whether that SV source is appropriate in this remand. *See Remand Opinion and Order* at 16-20.

Colombia

Parties previously argued prior to this remand proceeding that the Department should not rely on GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" from Colombia because the overall average unit value ("AUV") of Belgian exports to Colombia varies significantly from the Belgian-origin import AUV reported in the Colombian GTA import data[26] and that the high AUV of U.S. exports to Colombia is unreliable because the record demonstrates the U.S. domestic price of anthracite coal is far below that of the U.S. imports into Colombia.[27] We continue to find that the Colombian GTA import data under HS code 2701.11 meet the Department's SV selection criteria, *i.e.*, it is contemporaneous, publicly available, tax and duty exclusive, represents a broad market average, and it is specific to the input.[28]

When determining whether data are aberrational, the Department has found that the existence of higher prices alone does not necessarily indicate that the price data are distorted or misrepresentative, and thus is not a sufficient basis upon which to exclude a particular SV.[29] Interested parties must provide specific evidence showing the value is aberrational. If a party presents sufficient evidence to demonstrate a particular SV may be aberrational, and therefore unreliable, the Department will examine all relevant price information on the record, including any appropriate benchmark data, in order to accurately value the input in question. With respect to benchmarking, the Department may examine import data from the previous years for the potential surrogate countries for a given case, to the extent such import data are available, and/or

[26] *See, e.g.*, Cherishmet Case Brief, dated July 3, 2014, at 11-12; Albemarle Corporation ("Albemarle") and Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui") Case Brief, dated July 3, 2014, at 2.
[27] *Id.*
[28] *See* Petitioners' SV Submission, dated April 21, 2014, at Attachment.
[29] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011) ("*Vietnam Shrimp 2011*"), and accompanying IDM at Comment 1.E.

examine data from the same HS category for the surrogate country over multiple years to determine if the current data appear aberrational compared to historical values.[30]

While the value of Colombian GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" may be high in comparison to the GTA import data for anthracite from other countries, parties have not provided any Colombian import data from years previous to the POR on the record which would demonstrate the Colombian SV is unreliable. While certain parties argue that the Belgian and U.S. export AUVs differ significantly from their import AUVs into Colombia, we note that the Department does not expect export and import data to match on a one-to-one ratio.[31] Differences between export data from one country and import data for another can be explained by temporal differences, product mix differences, differences in levels of sales (free on board ("FOB") export versus cost-insurance-freight ("CIF") import pricing) and differences in types of entry (customs territory versus special trade zones) that exist between the two sources of trade data. Further, the record does not contain information which demonstrates that Colombian GTA import data are aberrant in relation to prior years, or in relation to the other anthracite coal import values recorded in the GTA for other potential surrogate countries. Accordingly, because Colombia is at the same level of economic development as the PRC,[32] a

[30] *See Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010) ("*Carbazole*"), and accompanying IDM at Comment 6.
[31] *See Calgon Carbon Corp. v. United States*, Slip Op. 11-21, at 22 (CIT February 17, 2011) (finding unavailing party's argument that selected SV source for coal tar was in error because import and export quantities differed for SV source, given Department's explanation that discrepancy did not call into question data because Department did not expect export and import data to "match up at a one-to-one ratio"); *see also Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35245 (June 12, 2013), and accompanying IDM at Issue 2(I)(A) ("*PET Film*") (rejecting challenge to selection of Indonesian SV because Department "does not expect one country's export quantities to be a one-to-one ratio to another country's import data").
[32] *See* Letter to All Interested Parties, re: "Sixth Administrative Review of Certain Activated Carbon from the People's Republic of China: Deadlines for Surrogate Country and Surrogate Value Comments," dated August 2, 2013 ("Surrogate Country Memo").

significant producer of comparable merchandise,[33] and there is no information on the record which demonstrates that Colombian GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" are unreliable or otherwise unusable, these data are a potential source with which to value the respondents' anthracite coal input.

Indonesia

With respect to GTA import data from Indonesia, parties in this case previously argued prior to this remand proceeding that the Indonesian import data are unreliable, pointing to a number of factors: 1) countries from which Indonesia imported anthracite coal do not have indigenous anthracite coal production or coal reserves;[34] 2) there exist significant discrepancies between GTA import data from Indonesia and GTA export data from Singapore;[35] 3) the AUV of imports into Indonesia from various countries demonstrates that the merchandise imported into Indonesia under HS code 2701.11: "Anthracite Coal, Not Agglomerated" are not bulk anthracite coal,[36] and; 4) the record evinces subsidies granted to German coal producers.[37]

As noted above, when determining whether data are aberrational, interested parties must provide specific evidence showing the value is aberrational and provide appropriate benchmarking data.[38] In this instance, the record contains information which demonstrates that POR Indonesian imports of anthracite coal exhibits a sharp increase in price, inconsistent with the previous years of Indonesian anthracite prices. Specifically, between 2009 and 2011, the Indonesian AUV ranged between 0.24 and 0.37 U.S. dollars ("USD") per kilogram ("USD/kg"),

[33] *See* Jacobi's Surrogate Country Selection Comments, dated October 23, 2013, at Attachment A; *see also* Cherishmet's Surrogate Country Selection Comments, dated October 23, 2013,
[34] *See, e.g.*, Cherishmet's Case Brief, dated July 3, 2014, at 8-9.
[35] *Id*.
[36] *Id.*
[37] *Id*.
[38] *See Carbazole* and accompanying IDM at Comment 6.

while during the POR, the AUV spiked to 2.37 USD/kg.[39] Moreover, the Indonesian POR AUV for anthracite coal is far above the POR AUVs of Colombia, South Africa, Thailand, and Ukraine, and nearly twice the AR6 Philippine anthracite SV, which was found not specific to anthracite coal.[40] Therefore, we continue to find that Indonesian import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" are not reliable to value the anthracite coal input of the respondents.[41]

Additionally, in accordance with the legislative history of the OTCA 1988, the Department continues to apply its long-standing practice of disregarding certain prices as SVs if it has a reason to believe or suspect that these prices may have been dumped or subsidized.[42] Parties contend that German data included in the GTA Indonesian import statistics are distorted and unreliable because of German subsidies granted to coal producers.[43] We acknowledge that the record shows that Germany subsidized its hard coal production during the POR.[44] Further, there is no evidence demonstrating that Germany maintains broadly available, non-industry specific export subsidies.[45] However, there has been no finding by the Department that these subsidies have been found countervailable. Therefore, at this time, we find exporters of anthracite coal from Germany have not benefitted from export subsidies. Thus, we do not find it appropriate to dismiss the Indonesian GTA data on this additional ground. However, as noted above, we have found the Indonesian data to be unreliable on other grounds.

[39] *See* Jacobi's SV Submission, dated November 20, 2013 at Exhibit SV-3.
[40] *Id.; see also* Cherishmet's SV Submission, dated November 20, 2013 at Exhibit 3D-E, and; Petitioners' SV Submission, dated April 21, 2014, at Attachment.
[41] We also note that no party contested this finding in their comments upon the draft remand.
[42] *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100-576, at 590-91 (1988) ("OCTA 1988").
[43] *See, e.g.*, Cherishmet's Case Brief at 10 and Albemarle/Hauhui's Case Brief at 17-21.
[44] *See* Cherishmet's First SV Rebuttal Submission (December 17, 2013), at Exhibit 6, page 9.
[45] *Id.*

Thailand

As an initial matter, we find that the Thai GTA import data under HS code 2701.11 meet the Department's SV selection criteria, *i.e.*, it is contemporaneous, publicly available, tax and duty exclusive, represents a broad market average, and it is specific to the input.[46]

Parties previously argued prior to this remand proceeding, first, that the Department should not rely on GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" from Thailand because export AUVs from Australia, Malaysia, and Ukraine vary significantly from their import AUVs into Thailand.[47] In addition, parties previously argued that certain export data on the record indicate no exports of anthracite coal to Thailand from certain countries in the Thai GTA import data during the period of review.[48]

As noted above, when determining whether data are aberrational, interested parties must provide specific evidence showing the value is aberrational and provide appropriate benchmarking data.[49] Although parties had previously argued that certain countries' export data differ from the Thai import data for the same period, we note again that the Department does not expect export and import data to match on a one-to-one ratio.[50] In addition, although the Department does not typically use export data to impeach import data, it may consider corroborative evidence from trade information service providers, such as PIERS and ZEPOL, to disregard GTA import data where there is a one-to-one match between the corroborative data and

[46] *See* Petitioners' SV Submission, dated April 21, 2014, at Attachment.
[47] *See, e.g.*, Cherishmet's Case Brief, at 10 and Albemarle and Hauhui's Case Brief, at 17-21.
[48] *Id.*
[49] *See Carbazole*, and accompanying IDM at Comment 6.
[50] *See Calgon* at 22; *see also PET Film*, and accompanying IDM at Issue 2(I)(A).

the GTA import data.[51] Again, there is no one-to-one match between the import and export data, nor would the Department normally expect those two datasets to match for the reasons stated above. Therefore, we find no reason to disregard the Thai GTA import data for the reason that GTA export data are not a one-to-one match.

Furthermore, parties had previously claimed that the Thai data reflect an AUV of $105,000.00 per metric ton for alleged imports of anthracite coal from Malaysia, which is multiple times higher than the Philippine GTA import data discussed above, and reflected a shipment size of 0.05 metric tons (50 kilograms).[52] However, while higher than the other import values being considered, the quantity and value (*i.e.*, 50 kilograms and $5,255 per kilogram) of the Malaysian imports in the Thai data have no effect on the overall Thai AUV. When using GTA data to calculate an SV for respondents' inputs, the Department calculates the AUV based on how the data were reported to GTA. In this instance, the Thai Government reported the anthracite coal statistics to GTA on a per kilogram basis. Hence, we calculated the Thai AUV on a per-kilogram basis, which results in a Thai AUV of $0.33 per-kilogram, with or without the Malaysian imports included in those data. Therefore, we find no reason to alter the Thai AUV calculation for the Malaysian data.

Finally, there also exists no information on the record to find that the GTA Thai import data from these countries do not represent anthracite coal. In addition, we note that the Thai GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated," between the years 2009 and the POR demonstrates no sharp spikes in price or aberrant behavior, unlike our

[51] *See Remand Opinion and Order* at 17-18 (holding that it was appropriate for Department to rely on PIERS and ZEPOL data to find the contemporaneous Philippine GTA import data not specific to anthracite coal input). The CIT has sustained the Department's authority to use trade service information to corroborate or discard information derived from GTA. *See Globe Metallurgical, Inc. v. United States*, 33 CIT 435, 439-440 (CIT 2009) (sustaining decision not to rely on "infodrive" data because Department could not discern percentage of total imports captured by those data).

[52] *See* Albemarle and Huahui Case Brief, at 20.

findings regarding the Indonesian GTA data discussed above.[53] Accordingly, because Thailand is at the same level of economic development as the PRC,[54] a significant producer of comparable merchandise,[55] and the record does not support finding the Thai GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" to be unreliable, or otherwise unusable, we continue to find the Thai data is a potential SV source to value the respondents' anthracite coal input.

South Africa

The South African GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" meet the Department's SV selection criteria and no parties have argued that this data is inappropriate to use to value respondents' anthracite coal input.[56] Because South Africa is at the same level of economic development as the PRC, [57] a significant producer of comparable merchandise,[58] and the South African GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" meets the breadth of the Department's SV selection criteria, we continue to find that the South African data is a potential SV source to value the respondents' anthracite coal input.[59]

Ukraine

We have also considered whether the anthracite coal SV on the record for Ukraine could be used, but first had to revisit whether it is appropriate to consider Ukraine as a potential surrogate country. Petitioners had argued prior to this remand proceeding that Ukraine is not

[53] *See* Jacobi's SV Submission, dated November 20, 2013 at Exhibit SV-3.
[54] *See* Surrogate Country Memo.
[55] *See* Jacobi's Surrogate Country Selection Comments, dated October 23, 2013, at Attachment A; *see also* Cherishmet's Surrogate Country Selection Comments, dated October 23, 2013,
[56] *See* Cherishmet's Surrogate Value submission, dated November 20, 2013, at Exhibit 3E.
[57] *See* Surrogate Country Memo.
[58] *See* Jacobi's Surrogate Country Selection Comments, dated October 23, 2013, at Attachment A; *see also* Cherishmet's Surrogate Country Selection Comments, dated October 23, 2013.
[59] We also note that no party challenged our findings regarding the South African SV in their comments upon the draft remand.

appropriate to use to value anthracite coal because it is not on the list of potential surrogate countries, and the Department has found in a past administrative review of this order that Ukraine is not a significant producer of activated carbon and should continue to do so in this administrative review.[60]

In making a determination of whether a country is at the same level of economic development comparable to the NME country, the Department will place emphasis on the on per capita gross national income ("GNI") as the measure of economic comparability.[61] Although Petitioners had previously argued that Ukraine is not identified on the surrogate country list, the Department's Policy Bulletin and Surrogate Country Memo explains that the surrogate countries on the (non-exhaustive) surrogate country list are not ranked.[62] This lack of ranking reflects the Department's long-standing practice that, for the purpose of surrogate country selection, the countries on the list "should be considered equivalent" from the standpoint of their level of economic development, based on per capita GNI, as compared to the NME country's level of economic development.[63] This also recognizes that the "level" in an economic development context necessarily implies a range of per capita GNI, not a specific per capita GNI.[64] Here, the GNI range on the Surrogate Country Memo is 2,210 USD to 7,640 USD based on the year 2011.[65] Ukraine's GNI based on the year 2011 is 3,150 USD.[66] Therefore, because Ukraine's

[60] *See* Petitioners' Rebuttal Case Brief, dated July 18, 2014, at 23 (citing *Certain Activated Carbon From the People's Republic of China: 2010-2011; Final Results of Antidumping Duty Administrative Review*, 77 FR 67337 (November 9, 2012) ("*AR4 Carbon*") and accompanying IDM at Comment 1.c(A)).
[61] *See, e.g., Jiaxing Brother Fastener Co. v. United States*, 961 F. Supp. 2d 1323, 1330 (CIT 2014) ("*Jiaxing 2014*") (the Department's "use of per capita GNI as the measure of economic comparability (as opposed to some other assortment of metrics that account for the specific features of relevant industries in potential surrogate countries) is a reasonable interpretation of the statutory mandate . . ."); *see also* 19 CFR 351.408(b).
[62] *See* Policy Bulletin 04.1; *see also* Surrogate Country Memo.
[63] *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 37715 (July 2, 2014), and accompanying Issues and Decision Memorandum at Issue 1.
[64] *See* Policy Bulletin 04.1.
[65] *See* Surrogate Country Memo.
[66] *See* Cherishmet's SV Submission at Exhibit 3J.

GNI is well within the GNI range of the countries identified on the surrogate country list, the Department considers Ukraine to be at the same level of economic development as the PRC.

Although Petitioners are correct that we found Ukraine was not a significant producer in *AR4 Carbon*, the information on this record indicates that Ukraine has domestic production of comparable merchandise and is an exporter of activated carbon.[67] Policy Bulletin 04.1 states that "the meaning of 'significant producer' can differ significantly from case to case." Furthermore, the Act and regulations are silent in defining a "significant producer." Although the legislative history provides that the "term 'significant producer' includes any country that is a significant net exporter,"[68] it does not preclude reliance on additional or alternative metrics based on record evidence to determine which countries might be included as significant producers. Information on the record indicates that Ukraine does have domestic production of activated carbon.[69] Specifically, the record indicates that G&H Charcoalwoodpellet Company Ltd. is a Ukrainian company that produces granular activated carbon.[70] Additionally, the record indicates that, during the POR, Ukraine had significant production of comparable merchandise, which includes activated carbon, and was an exporter of activated carbon during the POR.[71] As noted above, because we found Ukraine to be at the same level of economic development as the PRC and a significant producer of comparable merchandise, we consider Ukraine a potential source for SVs.

[67] *See* Cherishmet's SV Submission, dated April 21, 204, at Exhibit 2B and Jacobi's Surrogate Country Comments, dated October 23, 2013, at Attachment A.
[68] *See* Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Conf. Rep. No. 576, 590, 100th Cong. 2nd Sess. (1988), reprinted in 134 Cong. Rec. H2031 (daily ed. April 20, 1988).
[69] *See* Cherishmet's Third SV Submission, dated April 21, 2014, at Exhibit 2B.
[70] *Id.*
[71] *See* Jacobi's Surrogate Country Selection Comments, dated October 23, 2013, at Attachment A.

Additionally, we note that the Ukraine GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" meet the Department's SV selection criteria described above and are a potential source to value the respondent's anthracite coal input.[72]

Anthracite Coal SV Selection

The Department respectfully disagrees with the Court's holding that the Department must reconsider the SV for anthracite coal because we relied too much on our regulatory preference of valuing factors in the primary surrogate country at the expense of dismissing other usable SVs from other economically comparable countries. However, we acknowledge that an analysis of the GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated," from Colombia, Indonesia, South Africa, Thailand, and Ukraine shows that there is contemporaneous import data from countries other than the Philippines suitable to use for valuing respondents' anthracite coal input. For the reasons discussed below, for this final remand redetermination, we are now relying on the contemporaneous Thai SV data to value respondents' anthracite coal inputs in this administrative review.

As discussed above, after evaluating the GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated," we find that the data from Colombia, South Africa, Thailand, and Ukraine are suitable to use to value Cherishmet's and Jacobi's anthracite coal input. In contrast, as explained above, we find that the data from Indonesia are not suitable to use to value respondents' anthracite coal input. Because the Department is confronted with data sources of equal reliability from multiple possible surrogate countries (*i.e.,* all of them are GTA import data from the same HS category and are otherwise not problematic), none of which are from the selected primary surrogate country, the Department has determined, in this instance, to select the anthracite coal SV based on which alternative surrogate country is the most significant

[72] *See* Cherishmet's SV Submission, dated November 20, 2013, at Exhibit 3D.

producer of comparable merchandise.[73] In this circumstance, we find that this methodology is reasonable because the greater the significant production of activated carbon, the greater the intensity of the industry within a particular country, and thus, the greater potential of broad-based demand for import of the inputs used in production of the comparable merchandise. Based on U.S. import data placed on the record by Petitioners, and United Nations Comtrade ("UNComtrade") data placed on the record by Jacobi to demonstrate significant production, the countries at the same level of economic development as the PRC in order of production volume of comparable merchandise are: 1) the Philippines; 2) Indonesia; 3) Thailand; 4) South Africa; 5) Colombia, and; 6) Ukraine.[74] We note that Costa Rica, although it is on the surrogate country list for this review,[75] did not have significant production during the POR.[76]

Because the Court agreed with the Department that the contemporaneous Philippines anthracite coal SV on the record is not specific to the respondents' anthracite coal input,[77] and because the Court found that the Philippines anthracite coal SV used in the *AR6 Final Results* is problematic,[78] we turned to Indonesia as the next largest producer of comparable merchandise. However, as discussed above, we determined that the Indonesian SV for anthracite coal on the

[73] The CIT recently sustained the Department's reliance on a SV from an alternative surrogate country that constituted the next largest producer of comparable merchandise in *Ad Hoc Shrimp Trade Action Comm. v. United States*, Slip Op. 16-7, at 30-36 (CIT January 21, 2016) ("*Ad Hoc Shrimp*"). There, the Department in the context of a remand redetermination selected Thailand as the primary surrogate country, but found the Thai SV for shrimp feed to be aberrational, and used an Indonesian shrimp feed SV to value that input instead. *Id.*
[74] *See* Petitioners' Surrogate Country Comments, dated October 23, 2013, at 4, and Jacobi's Surrogate Country Comments, dated October 23, 2013, at Attachment A. We also note that, as discussed further below at Issue 2, the United States is not at the same level of economic development as the PRC to warrant consideration of the U.S. Energy Information Agency ("EIA") data as a potential SV for anthracite coal in light of other usable SVs on the record from potential secondary surrogate countries at the same level of economic development as the PRC.
[75] *See* Surrogate Country Memo.
[76] *Id.*
[77] *See Remand Opinion and Order* at 16-20.
[78] *Id.* at 21-24 (noting that "{t}here is no supporting data on the record of this review for the POR5-contemporaneous Philippine value. Commerce simply imported the SV wholesale from the earlier review," such that "{e}ffectively, the selection is unreviewable," and also noting that public information that the Court identified appears to call into question the quantity level of this SV source vis-à-vis quantity levels of other potential SV sources).

record is unusable for valuing the anthracite coal input of the mandatory respondents. Therefore, we find that, because Thailand is the third largest producer of comparable merchandise amongst the potential secondary surrogate countries, and because we find the SV otherwise reliable, for this remand redetermination, we valued anthracite coal using GTA – Thai import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" that are contemporaneous with the POR, specific to the input and tax and duty exclusive. As such, we find that these data provide the best available information on the record for purposes of calculating an accurate SV.

2. <u>Assign Shanxi DMD a Separate Rate</u>

Background

In the *Initiation Notice*, the Department notified parties of the application process by which exporters and producers may obtain separate-rate status in NME proceedings.[79] In the *AR6 Prelim Results*, the Department explained that there is a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate.[80] While Shanxi DMD had a separate rate in the previous administrative review,[81] it did not submit either a separate rate application or separate rate certification for the sixth administrative review.[82] Accordingly, and in keeping with the Department's practice, because the necessary information was not on the record of the review, we did not assign Shanxi DMD a separate rate.[83] For the final results, the denial of Shanxi

[79] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 FR 33052, 33053-54 (June 3, 2013) ("*Initiation Notice*").
[80] *See Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 29419 (May 22, 2014) ("*AR6 Prelim Results*") and accompanying preliminary decision memorandum at 9 ("PDM") (citing *Lined Paper*, 71 FR at 53082; *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof From the People's Republic of China*, 71 FR 29303, 29307 (May 22, 2006)).
[81] *See AR5 Carbon*, 78 FR at 70534-35.
[82] *AR6 Prelim Results*, 79 FR at 29420 & n.5, and accompanying PDM at Appendix (listing Shanxi DMD as part of the PRC-wide entity).
[83] *See AR6 Prelim Results* and accompanying PDM at 12-13.

DMD's separate rate was not contested, and the Department continued to find Shanxi DMD was not eligible for a separate rate.[84]

In litigation, Carbon Activated Corporation ("Carbon Activated"), a U.S. importer, challenged the Department's final results. Specifically, Carbon Activated argued that: (1) the application of the presumption of a NME-wide entity in NME AD proceedings is "arbitrary and capricious" as compared to the use of an all-others rate in NME CVD proceedings; (2) there is no evidence of government control in this review; (3) the PRC-wide rate is "excessive and punitive" because it is not reflective of Shanxi DMD's commercial reality; and (4) the application of per unit assessment rates is unlawful.[85] The Government responded that Carbon Activated failed to exhaust the entirety of its arguments at the administrative level and did not brief the merits of Carbon Activated's claims.

In its *Remand Opinion and Order*, the Court found the Government's failure to exhaust argument to be unavailing because the Department incorrectly assumed that Carbon Activated had an opportunity to challenge the PRC-wide rate at the administrative level because the rate was unchanged from the *AR6 Prelim Results*.[86] Specifically, the Court held that "{t}he government looks to the PRC-wide rate in a vacuum and fails to consider the actual context (*i.e.*, the other rates) in which {Carbon Activated} determined whether it was appropriate for it to challenge the rate assigned in the *Preliminary Results*."[87] The Court found no support for the contention that an interested party in Carbon Activated's position "is required to challenge the application of a more favorable rate and make arguments that it should have a less favorable

[84] *See AR6 Final Results*, 79 FR at 70164 and n.26.
[85] *See Remand Opinion and Order* at 7.
[86] *Id.* at 10.
[87] *Id.*

rate."[88] The CIT further found that because the Government did not address the merits of Carbon Activated's arguments before the Court and relied wholly on an exhaustion defense, the Government waived its ability to provide arguments supporting the Department's selection of the PRC-wide rate.[89] Additionally, the Court found, based on Carbon Activated's arguments, that the Department's presumption of government control is unsupported by substantial evidence in this case.[90] Given that Shanxi DMD filed a separate rate certification in every other segment of this proceeding, the Court determined that its failure to do so in this review appeared to be a "technical error."[91] In its *Remand Opinion and Order*, the Court ordered that "{the Department}, on remand, shall assign Shanxi DMD the all-others rate."[92] However, the Court held that Carbon Activated failed to exhaust its argument regarding the Department's application of a dollar-per-kilogram assessment rate to the PRC-wide entity.[93] Furthermore, in light of the Court's separate finding that the presumption of state control in this review was unsupported by substantial evidence, the Court also found Carbon Activated's argument that the PRC-wide entity rate is aberrant and punitive to be moot.[94]

Analysis

The Department respectfully disagrees with the Court's rationale and holding in its *Remand Opinion and Order*. However, under respectful protest,[95] the Department has assigned Shanxi DMD a separate rate. The Department notes that although the Court has ordered the Department to assign Shanxi DMD the "all-others rate,"[96] the Department does not calculate an

[88] *Id.*
[89] *Id.* at 11-13.
[90] *Id.* at 13-14.
[91] *Id.* at 14, n.11.
[92] *Id.* at 14.
[93] *Id.* at 11, n.8.
[94] *Id.* at 11, n.10.
[95] *See Viraj*, 343 F.3d at 1376.
[96] *See Remand Opinion and Order* at 14.

"all-others rate" in NME AD proceedings such as in the underlying administrative review. Based on the Court's reference elsewhere in its *Remand Opinion and Order* that "Shanxi DMD was treated as separate from the PRC-wide entity and was assigned the all-others rate" in the preceding fifth and subsequent seventh administrative reviews,[97] and that in both of those reviews, Shanxi DMD actually received a "separate rate,"[98] the Department understands the Court as ordering the assignment of the separate rate to Shanxi DMD.

Therefore, the Department, again under respectful protest, has applied the same methodology of determining the rate for non-examined separate rate respondents as it did in the challenged *AR6 Final Results*.[99] Specifically, the Department assigned Shanxi DMD a rate calculated using the ranged total U.S. sales quantities from the public version of the submissions from the individually-examined respondents with weighted-average dumping margins that are not zero or *de minimis* (*i.e.*, less than 0.5 percent)[100] from the public versions of their submissions.[101] In doing so, the Department has relied on the recalculated dumping margins for Jacobi and Cherishmet based on the SV change for anthracite coal in this remand.

C. SUMMARY AND ANALYSIS OF LITIGANTS' COMMENTS ON DRAFT REMAND RESULTS

The Department released the Draft Remand Results to parties for comment on April 6, 2016.[102] The Department initially provided parties with five days to comment upon the Draft Remand Results but, following the Court's April 8, 2016, order extending the deadline for the

[97] *Id.*
[98] *See AR5 Carbon*, 78 FR at 70535 (referring to Shanxi DMD as a separate rate respondent, and calculating the rate for non-examined separate rate respondents); *Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 61172, 61174 (October 9, 2015).
[99] *See AR6 Final Results*, 79 FR at 70164.
[100] *See* Jacobi's public version of its supplemental Section A questionnaire response, dated August 21, 2013, at Exhibit A-1; *see also* Cherishmet's public version of its supplemental Section A questionnaire response, dated August 30, 2013, at Exhibit SA-1.
[101] *Id.*
[102] *See* Draft Results of Redetermination Pursuant to Court Remand, *Calgon Carbon Corp. et al. v. United States*, Consol. Court No. 14-00326, dated April 6, 2016 ("Draft Remand Results").

Department to file its final remand redetermination with the Court, the Department extended the deadline for parties to comment on the Draft Remand Results by an additional seven days.[103] Albemarle/Huahui, Carbon Activated, Cherishmet, and Jacobi commented on the appropriate SV for anthracite coal. No other parties filed comments on the Draft Remand Results.

As explained below, we continue to reach the same conclusions that we reached in the Draft Remand Results. We address each of the parties' comments and provide our analysis in turn.

Issue 1: AR5 Philippine GTA Data

Albemarle/Huahui Comments

- The Department failed to implement the Court's remand order requiring it to weigh the data before it in order to properly determine the best available information because the Department did not evaluate the AR6 Thai GTA import data against the AR5 Philippine GTA data. The Department should use the AR5 GTA Philippine data to value anthracite coal because they are the best available information because they are specific to the anthracite coal used by the respondents and free from the distortive effect of introducing data from outside the primary surrogate country. The Court incorrectly usurped the Department's discretion to reject the AR6 Philippine GTA data in favor of the AR5 Philippine GTA data, and the Court did not indicate that the Department was prohibited from relying on the AR5 Philippine GTA data.

[103] *See* Memorandum to the File, from Ryan Mullen, International Trade Compliance Analyst, Enforcement and Compliance, Office V, re: "Extension of Deadline to Submit Comments on the Department's Draft Remand Determination," dated April 8, 2016.

Carbon Activated's Comments[104]

- The Department should continue to value anthracite coal using the AR5 GTA Philippine data because this value is from the primary surrogate country and is specific to the input. The record contains information to support the AR5 Philippine GTA data's reliability. Specifically, the U.S. EIA values for AR5 are in the same range as the Philippines, and also in the same range as the contemporaneous import values from Ukraine and South Africa. Further, the Department should find its preference to use Philippine data outweighs the preference for contemporaneous data.
- The Department hardly addressed the AR5 Philippine GTA data, never explained why that value is unusable, and did not compare the reliability of that value to the other potential SV sources.
- The Court has consistently upheld the Department's preference to value all SVs from the primary surrogate country.[105]

Cherishmet's Comments

- The Department should continue to use the AR5 Philippine GTA import data used in the *AR6 Final Results*. The Department should have placed the underlying data supporting the AR5 Philippine GTA SV on the record of this remand proceeding, considering the underlying data are available to and in the possession of the Department. The Department should weigh that SV against the other anthracite coal SVs on the AR6 record and find that:
    - No party challenged the AR5 Philippine GTA import anthracite coal data in that

[104] Although Carbon Activated timely filed comments upon the Draft Remand Results, the Department rejected those comments because they contained untimely new factual information. *See* Letter to Carbon Activated Corp., from Catherine Bertrand, Program Manager, Enforcement and Compliance, Office V, re: "Certain Activated Carbon from the people's Republic of China: Rejection of Untimely New Factual Information in Draft Remand Comments," dated April 25, 2016. Carbon Activated timely filed redacted comments.

[105] Carbon Activated cites to, *e.g.*, *Jiaxing Brother Fastener Co. v. United States*, 11 F. Supp. 3d 1326, 1332-1333 (CIT 2014); *Fresh Garlic Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 36168 (June 17, 2013).

review which establishes that value is accurate and reliable.

- Even the Court itself viewed the underlying data to support the AR5 Philippine GTA import data and, apart from pointing out the volume of imports – 160,000 kg, which is not insignificant – raised no specific concerns about the data's reliability.
- The Court did not order or ask the agency to discard the AR5 Philippine GTA import data, but rather asked the Department to weigh all of the available data to see if the Department's initial preference for the Philippine data was somehow outweighed by its slight lack of contemporaneity.
- The AR5 Philippine GTA import price is closely corroborated by the U.S. EIA price data for anthracite coal.
- The AR5 Philippine GTA is only slightly non-contemporaneous with AR6 and the there is no information on the record which indicates that there was any sudden spurts in the price of anthracite coal such that the inflator used by the Department could not account for the non-contemporaneity of the AR5 Philippine GTA SV. The Department's decision to forgo an analysis of the AR5 Philippine GTA data on the basis non-contemporaneity is inconsistent with judicial precedent.[106]

Jacobi's Comments

- The Department failed to adhere to the Court's instruction and conduct a comparative analysis of the AR5 Philippine GTA SV with the other anthracite coal SV data on the record. By not placing the underlying data on the record to support the AR5 Philippine GTA SV, the Department failed to carry out that analysis. The Department must conduct this comparative analysis for the final remand, which necessitates placing the underlying data to support that

[106] Cherishmet cites *Home Meridian International Inc. D/B/A Samuel Lawrence Furniture Co. and Import Services, Inc. v. United States*, Slip Op. 12-120. (CIT 2012).

SV on the record.[107]

Department's Position:

We disagree with parties that we should, or that the Court required us to, place the AR5 Philippine GTA import data for anthracite coal on the record for this remand. First, the Court did not explicitly order the Department to place the AR5 Philippine data on the record, but noted only that "{t}here is no supporting data on the record of this review for the POR5-contemporaneous Philippine value."[108] It is within the Department's discretion to reopen the record on remand.[109] The Court has already questioned the underlying quantity in the AR5 Philippine GTA import data, particularly as compared to other record SVs.[110] Furthermore, the Court explained that "the POR5-contemporaneous Philippine GTA data cannot be said on this record to be 'fairly equal' to the POR6-contemporaneous GTA data from these other countries because it is not contemporaneous with the POR."[111] Even if the Department were to place the underlying data to support the AR5 Philippine GTA import data on the record now and continue to apply an inflator, the Court also explained that "{t}he need for {the Department} to apply an inflator to the POR5-contemporaneous Philippine GTA data to adjust the old data to reflect POR6 prices demonstrates that non-contemporaneous data is not *ipso facto* equal to

[107] Jacobi states that it attached the underlying AR5 Philippine GTA anthracite coal import to its draft remand comments. *See* Jacobi's Draft Remand Comments, dated April 18, 2016, at 3. However, no such data was attached to its comments.
[108] *See Remand Opinion and Order* at 22.
[109] *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012) ("The decision to reopen the record is best left to the agency, in this case Commerce").
[110] *See Remand Opinion and Order* at 22 ("Second, the POR5-contemporaneous Philippine GTA data may not be as reliable as some of the POR6-contemporaneous GTA data from other countries. There is no supporting data on the record of this review for the POR5-contemporaneous Philippine value. Commerce simply imported the SV wholesale from the earlier review. Effectively, the selection is unreviewable. Publically available information, however, shows that the POR5-contemporaneous Philippine value of $0.05 per kilogram was derived from just slightly more than 160,000 kilograms of imports . . . Some of the other values on the record, such as the values for South Africa (over 80,000,000 kilograms) and the Ukraine (nearly 15,000,000 kilograms), are based on much higher quantities of imports and thereby likely provide more reliable data").
[111] *Id.*

contemporaneous data."[112] For these reasons, the Department finds it unnecessary to reopen the record to place the supporting data from AR5 on the record of this remand proceeding. Rather, as instructed by the Court, the Department has reconsidered its selection of an SV for anthracite coal by examining the reliability of the AR6 contemporaneous record GTA data for anthracite coal from Indonesia, Colombia, Thailand, and South Africa, all of which are at the same level of economic development as the PRC. Given that the underlying data for the AR5 Philippine SV are not on the record, the Department finds it unnecessary to compare that value relative to the other potential SV sources on the record, or vice versa.

Issue 2: U.S. EIA Data

Cherishmet's Comments

- In the event the Department does not use the AR5 Philippine GTA SV to value anthracite coal, the Department should use U.S. EIA domestic price data to value Cherishmet's anthracite coal input because: 1) U.S. coal is chemically and physically similar to Chinese anthracite coal; 2) the U.S. domestic market price is contemporaneous and product specific and corroborated by U.S. EIA price data and other record information; 3) the Department prefers a domestic market SV over import data;[113] and 4) the Department is not precluded from applying an otherwise suitable SV data reported from a technically non-economically comparable country.[114]

Jacobi's Comments

- The Department should have included U.S. EIA price data in its comparative analysis of potential anthracite coal SVs because the U.S. EIA information contains over 60 years of

[112] *Id.*
[113] Cherishmet cites *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 366 F. Supp. 2d 1264, 1273-74 (CIT 2005) ("*Hebei Metals*").
[114] Cherishmet cites *Shantou Red Garden Foodstuff Co. Ltd. v. United States*, Slip Op. 12-133 (CIT October 23, 2012) ("*Shantou*").

anthracite coal price data, is for anthracite coal which is virtually identical to the type of coal used by Jacobi's suppliers. Additionally, the Department refusal to consider this information is a direct refusal to comply with the Court's *Remand Opinion and Order* to analyze *all* record data for anthracite coal.

- The Department's refusal to consider U.S. Government data as a possible SV is contrary to multiple decisions of the CIT. The Department must conduct a fair comparison of all data sets on the record[115] and consider data from countries that are not on the surrogate country list that are otherwise available on the record and argued for by interested parties.[116]
- The CIT has concluded that, among the criteria considered by the Department for SV selection purposes, "product specificity" logically must be the primary consideration in determining best available information.[117] Although U.S. EIA data comes from a country not at a level of economic development as close to the PRC as other surrogate countries, this data is more specific to the type of anthracite coal consumed by Jacobi's suppliers than any other data on the record – except for the POR 5 Philippine data which also meets specific criteria. Thus, if the Department does not select the POR 5 Philippine data for its final remand determination, the U.S. EIA data constitutes the best SV on the record.

Department's Position:

With respect to the U.S. EIA data on the record, as the Department has previously noted, the United States is not at the same level of economic development as the PRC.[118] Specifically,

[115] Jacobi cites *Allied Pacific Food (Dalian) Co. Ltd. v. United States*, 435 F. Supp. 2d 1295, 1314-15 (CIT 2006).
[116] Jacobi cites *Clearon Corp. v United States*, 2015 Ct. Intl Trade LEXIS 91 (CIT August 20, 2015).
[117] Jacobi cites *Taian Ziyang Food Company, Ltd. v. United States*, 783 F. Supp. 2d 1292, 1300 (CIT 2011).
[118] The Department has sourced a SV for the major input from countries whose GNI is far greater than the PRC's only when encountering very unusual facts. For example, in *Crawfish from the PRC*, the Department used Spain as the SV source for the primary input, crawfish due to the paucity of valuation data from any other country. *See e.g., Freshwater Crawfish Tail Meat from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2013-2014*, 81 FR 21840 (April 13, 2016) ("*Crawfish from the PRC*").

the POR GNI for the United States is 48,602 USD and the PRC's GNI is 4,940 USD.[119] Further, the Department relies on SV data from countries whose GNI is not at the same level of economic development as the NME country, but still at a level comparable to that of the NME country, only when we have been unable to obtain SVs from any other source that is at the same level of economic development as the NME country.[120] In this proceeding, we have found suitable information from the secondary surrogate countries under the appropriate HS number, specifically HS number 2701.11: "Anthracite Coal, Not Agglomerated," from which to value respondents' anthracite coal inputs; we need not find or rely on SV information from countries whose GNI is far above the PRC's GNI.[121]

Citing *Hebei Metals,* Cherishmet contends that by selecting the U.S. EIA price, the Department will be applying a domestic market price data source, which the Department prefers over import data.[122] However, Cherishmet's citation to *Hebei Metals* is not illuminating in these circumstances. In *Hebei Metals*, the Court heard arguments regarding whether it was appropriate to use domestic prices or import prices from the same surrogate country, which was *at the level of economic development of the PRC.*[123] *Hebei Metals* does not speak to whether it is appropriate to use a domestic value from a country which is not at the same level of economic development as the PRC as compared to an import-based SV from a potential surrogate country that is at the same level of economic development as the PRC. Accordingly, we find that *Hebei Metals* is not

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[119] *See Cherishmet SV Submission, dated April 21, 2014 at Exhibit 2A; see AR6 Final Results and IDM at 36-37.*
[120] *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 79 FR 19053 (April 7, 2014) ("*Fish Fillets AR9*") and IDM at Comment IA (where the Department sought SV information from Indonesia whose GNI was greater than Vietnam's because the significant producer and data quality considerations for a "special or unique input" outweighed the fact that Indonesia was not at the same level of economic development as the NME country in question).
[121] *See, e.g., AR4 Carbon* and accompanying IDM at Comment IC(A) (finding HS 2701.11 for both Thailand and the Philippines "viable options" for valuing anthracite coal).
[122] *See Hebei Metals*, 366 F. Supp. 2d at 1273-1274.
[123] *Id.* Specifically, the Court in *Hebei Metals* considered whether the Department's selection of Indian import data over Indian Tata Energy Research Institute domestic data was appropriate.

instructive in this proceeding. Cherishmet also contends that the Department is not precluded from applying an otherwise suitable SV from a non-economically comparable country.[124] Although Cherishmet cites to *Shantou* as permitting the use of SV data from a non-economically comparable country, we note that *Shantou* referred to departing from the primary surrogate country to value an input, not whether it was appropriate to use SV data from a non-economically comparable country. Further, the Court ultimately did not render a decision on that specific matter in *Shantou*.[125]

Additionally, we disagree with Jacobi's contention that precedent from the Court requires the Department to include the U.S. EIA data in a comparison of all data sets on the record when selecting SV data[126] such that even when "presented with a less economically comparable country off the list {the Department} *must still provide an analysis* of how the data from the less comparable country presented does not outweigh its economic disparity."[127] As an initial matter, we note that the United States is not simply "less economically comparable," but not economically comparable to the PRC by a magnitude of nearly 100 percent. Because the PRC is an NME country, section 773(c)(4) of the Act requires the Department to value the FOPs, to the extent possible, in a surrogate country that is (a) at a level of economic development comparable to the PRC, and (b) a significant producer of comparable merchandise.[128] In the Surrogate Country Memo, the Department identified the GNI range within which countries could be considered at the same level of economic development. As noted above, the United States falls well outside this GNI range such that the GNI of the United States cannot be considered

[124] *See* Cherishmet's Draft Remand Comments, dated April 18, 2016, at pdf page 15-16, citing *Shantou*.
[125] *See Shantou* at 5 (holding that "plaintiff has waived any objection to the Department's decision to choose the Devi data over the Ecuadorian data by declining to object to this decision and by expressly supporting the Remand Redetermination").
[126] *See* Jacobi's Draft Remand Comments, dated April 18, 2016, at 15, citing *Allied Pacific*.
[127] *Id.* (quoting *Clearon Corp.*, 2015 Ct. Intl. Trade LEXIS 91, at 13 (emphasis added by Jacobi, internal quotations omitted)).
[128] *See also* Policy Bulletin 04.1.

comparable to the PRC or to the GNI range identified on the Surrogate Country Memo.[129] The Department acknowledges that it considers SVs from countries that are not at the same level of economic development as the NME country, but nevertheless, are still at a level comparable to that of the NME country. These countries are considered when data or significant producer considerations potentially outweigh the fact that these countries are not at the same level of economic development as the NME country.[130] However, in this instance, the record contains adequate data from countries which are at the same level of economic development as the PRC from which to use in the selection of an appropriate SV for anthracite coal. The Court has recognized the Department's preference for using SV data from potential surrogate countries.[131]

Issue 3: Significant Producer as Decision Factor

Carbon Activated's Comments

- The Department's decision to select a SV based on the most significant producer of comparable merchandise runs counter to its long-standing practice regarding this factor in its surrogate country selection process. There is no connection on the record between the relative significance of a country's production of activated carbon and the reliability of the imports of anthracite coal into that country. If the Department is attempting to find a price for anthracite coal based on a source (in this case, imports) that a hypothetical activated carbon producer in the country would use, then Thailand continues to be an illogical choice because it imports significantly less anthracite coal than Ukraine and South Africa.

[129] *See Jiaxing 2014* at 1328 (holding that Department's utilization of GNI is a "consistent, transparent, and objective metric to identify and compare a country's level of economic development," and is "a reasonable interpretation of the statute").
[130] *See AR9 Fish Fillets* and accompanying IDM at Comment 1.
[131] *See, e.g., Trust Chem Company Limited v. United States*¸791 F. Supp. 2d 1257, 1266 (CIT 2011) (finding that "Commerce adequately explained that 'while in the past the Department has used U.S. prices to benchmark surrogate values, the Department's current practice has been to benchmark surrogate values against imports from the list of potential surrogate countries for a given case.' Although there is no prohibition on using U.S. import data, Commerce's preference for data from potential surrogate countries was not unreasonable").

- The Department should use South African GTA import data to value the respondents' anthracite coal input because it has the largest import quantity of all the other countries. This would be in accordance with the Department's "practice" stated in the last two administrative reviews of *Chlor Isos from the PRC.*[132] In *Chlor Isos from the PRC*, the Department determined to value a critical input using imports into the country, from the listed countries at the same level of economic development, which was the largest importer of the input. The Department should use this practice here.

Cherishmet's Comments

- The Department should not have used relative levels of significant production of comparable merchandise because the more pertinent criteria are the relative levels of the quality of imports/production of the input, which directly forms the basis for the AUV.[133] Total Thai imports of anthracite coal (681.93 metric tons) are far lower as compared to imports in South Africa, Ukraine, or domestic production in the United States. Therefore, price data from Thailand cannot be preferred over the price data from South Africa, Ukraine, or the United States.

Jacobi's Commnets

- The Department incorrectly determined that Thailand is a significant producer of activated carbon. In the past, to identify significant producers, the Department has used either (i) significant net exports, or (ii) significant exports to the United States when there was no

[132] Carbon Activated cites to *Chlorinated Isocyanurates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 1167 (January 11, 2016) ("*Chlor Isos from the PRC 2016*") and accompanying IDM at Comment 1, and *Chlorinated Isocyanurates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 4539 (January 28, 2015) ("*Chlor Isos from the PRC 2015*"), and accompanying IDM at Comment 2 (collectively "*Chlor Isos from the PRC*").
[133] Cherishment cites *Peer Bearing Company-Changshan v. United States*, 2013 Ct. Intl. Trade LEXIS 119 (August 30, 2013) ("*Peer Bearing 2013*") ("Commerce again chose the Indonesian import data over the Philippine import data because the former were based on larger quantities and values and therefore 'more robust and representative of broader market averages'").

information showing worldwide production of subject merchandise or production figures in potential surrogate countries.[134] The record demonstrates that Thailand was a net importer of activated carbon by value and an insignificant net exporter by quantity export volume. Consequently, Thailand is not a significant producer of activated carbon during the POR and the Thai SV is inappropriate.

Department's Position:

As an initial matter, the Department will determine, on a case-by-case basis, the appropriate methodology to select among equally valid SV choices from a secondary surrogate country; whether it uses a methodology based on significant production of comparable merchandise or a selection based on import quantity depends on the facts of each case. This reflects that the Department "has discretion to determine what constitutes the best available information, as this term is not defined by statute."[135]

The Department has, in certain instances, turned to significant production of comparable merchandise as an analysis tool in SV selection when selecting SVs from other than the primary surrogate country.[136] In this instance, we find it reasonable to conclude that the greater the significant production of activated carbon, the greater the intensity of the industry within a particular country, and thus, the greater potential of broad-based demand for the inputs used in production of the comparable merchandise.

With respect to *Chlor Isos from the PRC 2016*, the Department addressed the tie-breaking criterion there by stating that ranking alternate surrogate countries by volume of imports to value

[134] Jacobi cites to *Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Final Results, Partial Rescission and Termination of a Partial Deferral of the 2002-2003 Administrative Review*, 69 FR 65148 (November 10, 2004) ("*Apple Juice*").
[135] *See Jiaxing Brother Fastener Co. v. United States*, 2016 U.S. App. LEXIS 7196, at *4 (Fed. Cir. 2016).
[136] *See Ad Hoc Shrimp* at 30-36.

an input follows the methodology used in the prior review, *Chlor Isos from the PRC 2015*,[137] and ensures that the SV is not aberrational when relying on an alternate surrogate country. In *Chlor Isos from the PRC 2015*, in which we first utilized the import ranking analysis, we stated that this ranking methodology was our "practice" and cited to *Glycine*.[138] In *Glycine*, we selected the Indonesian SV for liquid chlorine because it had the highest import volume for the input during the POR that was not aberrational in comparison to the other economically-comparable countries.[139] However, the Department was not facing a tie-breaking situation in *Glycine*. In *Glycine*, we analyzed import volumes amongst all potential surrogate countries to determine whether the volume of imports from the primary surrogate country, Indonesia, was of commercial quantities.[140] We found that the import volume for the primary surrogate country exceeded those of five other countries during the POR of that case and, thus, combined with the fact that the import volumes were over a certain tonnage, we were satisfied that this volume represented significant commercial quantities during the POR.[141] We also found that the corresponding AUV fell within the range of AUVs on the record for all potential surrogate countries.[142] Thus, in *Glycine*, we found the import quantity and AUV was not aberrational and we valued the input from the import data of the primary surrogate country.[143] Thus, we do not consider *Chlor Isos from the PRC 2015* to establish a practice with respect to selecting an SV from equally viable secondary surrogate country SV sources. Furthermore, in *Chlor Isos from*

[137] *See Chlor Isos from the PRC 2015*, and accompanying IDM at Comment 2.
[138] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 641000 (October 18, 2012) ("*Glycine*"), and accompanying IDM at Comment 1.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

the PRC 2016, the Department used the largest quantity of imports of chlorine to select among four equally viable SV sources "consistent with our practice in th{a}t proceeding."[144]

In this proceeding, rather than use imports as a tie-breaker as in the *Chlor Isos from the PRC* proceeding, we have selected a significant producer methodology. We find this approach more reasonable than the *Chlor Isos from the PRC* approach here because of the relative size of the significant production quantities of the potential anthracite coal SV sources. The Philippines, the primary surrogate country in this segment, exported 56,444,767 kg of activated carbon during the POR, followed by Indonesia with 22,835,450 kg, and Thailand with 6,555,094 kg.[145] South Africa's, Colombia's, and Ukraine's export quantities of activated carbon were 662,157 kg, 287,186 kg,[146] and 43,329 kg,[147] respectively. Because South Africa's, Colombia's, and Ukraine's production quantities of activated carbon are considerably less than the Philippines, the Department finds it reasonable to seek a secondary surrogate country whose production of activated carbon is similar to the intensity of the industry, in this instance Thailand.[148] Thus, we have used significant production of comparable merchandise as the tie-breaking methodology, as in *Ad Hoc Shrimp*, rather than the import methodology used in the *Chlor Isos from the PRC* proceeding.

Citing to *Peer Bearing 2013*, Cherishmet contends that the Department should not have used relative levels of significant production of comparable merchandise because the more pertinent criteria are the relative levels of the quality of imports/production of the input, which directly forms the basis for the AUV.[149] In *Peer Bearing 2013*, the Department sought to choose

[144] *See Chlor Isos from the PRC 2016*, 81 FR at 1167, and accompanying IDM at Comment 1.
[145] *See* Petitioners' Surrogate Country Comments, dated October 23, 2013, at 4.
[146] *Id.* for South African and Colombian export quantities.
[147] *See* Jacobi's Surrogate Country Comments, dated October 23, 2013, at Attachment A.
[148] The Department found that Indonesia's SV for anthracite coal was unreliable for AR6.
[149] *See Peer Bearing 2013*, 2013 Ct. Intl. Trade LEXIS 119 at *12, *vacated and remanded on other grounds* 766 F.3d 1393 (Fed. Cir. 2014).

between two SV sources and chose to use the SV with the larger import volume because that SV source was considered more robust.[150] Nonetheless, the Court of Appeals for the Federal Circuit has explained that the Department has discretion in its selection of SVs as long as its selection is reasonable, based on record evidence, and based on the best available information.[151] In this instance, we find that selecting the best available information from among equally viable SV sources using significant production of comparable merchandise is reasonable as we find it is more appropriate to rank the countries by production of comparable merchandise because that is a factor in determining the overall surrogate country.[152] In this instance, to break the tie between equally comparable SV sources, the Department has sought an appropriate secondary surrogate country which has significant production of comparable merchandise, *i.e.*, activated carbon. Here, following the Philippines and Indonesia, Thailand is the largest producer of activated carbon, which is the identical merchandise produced by the respondents. Furthermore, as discussed above and below, the Thai anthracite coal SV meets the breadth of the Department's SV selection criteria.

Jacobi argues that the Department incorrectly determined that Thailand is a significant producer of activated carbon because Thailand was a net importer of activated carbon by value and an insignificant net exporter by quantity export volume. Jacobi argues that in the past, to identify significant producers, the Department has used either (i) significant net exports, or (ii) significant exports to the United States when there was no information showing worldwide production of subject merchandise or production figures in potential surrogate countries.[153] The

[150] *Id.*
[151] *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).
[152] *See* Policy Bulletin 04.1.
[153] Jacobi cites to *Apple Juice*, 69 FR at 65148.

Act does not define the phrase "significant producer."[154] Certain legislative history suggests that the Department may consider a country to qualify as a "significant producer" if, among other things, it is a "net exporter" of identical or comparable merchandise.[155] However, that text does not define the phrase "net exporter" or explain whether a potential surrogate country must constitute a net exporter in terms of quantity, value, or both to fit the example provided in the legislative history.[156] As a result, this ambiguous provision of the Act does not preclude the Department's reliance on additional or alternative metrics based on record evidence to determine which countries might be included as "significant producers."[157] We find the fact that a country exports comparable merchandise to other countries to be a strong indication that the country is a significant producer of such merchandise.[158] Further, our practice is to consider quantity, rather than value, in determining whether a country is a significant producer because quantities are not subject to influence from outside variables, such as currency fluctuations and inflation, among other external pressures.[159] Here the record evidence demonstrates that Thailand is an exporter of identical merchandise.[160] Indeed, Thailand, after the Philippines and Indonesia, is the highest

[154] *See* section 773(c)(4)(B) of the Act; *see also* Policy Bulletin 04.1.
[155] *See* Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Rep. No. 100-576, at 590, 1988 U.S.C.C.A.N. 1547, 1623 (1988); *see also* Policy Bulletin 04.1.
[156] *Id.*
[157] *See Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1274 n.5 (CIT 2006).
[158] *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 FR 33241 (June 11, 2015), and accompanying IDM at Comment 2.A ("Following our longstanding practice, we presume that countries exporting comparable merchandise are also significant producers of such merchandise"); *Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 80 FR 17409 (April 1, 2015), and accompanying PDM at "Surrogate Country and Surrogate Value Comments" ("After reviewing this export data, the Department preliminarily determines that Bulgaria, Ecuador, Romania, South Africa, Thailand, and Ukraine are significant producers of comparable merchandise (i.e., exported merchandise under the six-digit basket HS codes included in the scope"), *unchanged in Boltless Steel Shelving Units Prepackaged for Sale From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 80 FR 51779 (August 26, 2015), and accompanying IDM.
[159] *See Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 18816 (April 8, 2015), and accompanying IDM at Comment 1.B.
[160] *See* Petitioners' Surrogate Country Comments, dated October 23, 2013, at 4, and Jacobi's Surrogate Country Comments, dated October 23, 2013, at Attachment A.

exporter by volume of identical merchandise.[161] Accordingly, we find that Thailand is a significant producer of activated carbon.

Issue 4: Thai SV

Carbon Activated's Comments

- The Department should not use AR6 Thai import data because in the *AR8 Carbon Prelim*, the Department determined that AR5, AR6, AR7 and AR8 import data for anthracite coal were unreliable because they were "unreliably volatile" and should not be used to value anthracite coal.[162] It is arbitrary for the Department to find in one review that the Thai import data for AR6 are unreliable but also to find in the sixth review that AR6 Thai import data are reliable.
- Additionally, the AR6 Thai import data are unreliable because the record contains export data for anthracite coal from Australia, Malaysia, and Ukraine, the only three market economy countries importing anthracite coal into Thailand. The export data from these are significantly different than the Thai import data for each of these countries and the Department should find these significant differences a reasonable basis for finding the Thai data unreliable.
- The Department should use South African GTA import data to value the respondents' anthracite coal input. Alternatively, the Department could rely on Ukraine import statistics to value the anthracite coal input. The Ukraine price from the import statistics are corroborated by Ukraine domestic prices for anthracite coal.

Cherishmet's Comments

- The Department should apply the following set of criteria in evaluating SV sources:

[161] *Id.*
[162] Carbon Activated cites to *Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 11513 (March 4, 2016) ("*AR8 Carbon Prelim*"), and accompanying PDM at 25.

- Weigh the relative total quantity of imports underlying GTA HS 2701.11 in each country, and quantity of production in the case of U.S. EIA domestic production.
- Examine the reliability of the AUV of imports from the individual exporting country, in light of other record evidence.
- Apply the U.S. EIA average domestic price and U.S. EIA average export price either as source data and/or benchmark data to check the reliability of other data sources.

- The Thai GTA data for anthracite coal are unreliable because:
  - Ukraine imports of anthracite coal into Thailand make up the bulk of the Thai GTA import data. The domestic and export prices in Ukraine, which vary in the range of 94-128 USD/MT, impeach the reliability of the AUV of 300 USD/MT reported in the Thai GTA import data.
  - Australian GTA export data reveal there were no exports from Australia to Thailand during the POR. Further, the Thai GTA import data report Australian import AUV ranges between 343.42 – 497.70 USD/MT while the overall AUVs for anthracite coal exported from Australia during the same time period was between 77.04 – 173.20 USD/MT, which demonstrates that the AUVs of Australian origin imports are over-reported in the Thai GTA import data.
  - Malaysian GTA export data also reveal no exports to Thailand.
  - The U.S. EIA price data provide a suitable benchmark price because they are for the same type of anthracite coal used by Cherishmet. The U.S. EIA open market coal prices and U.S. FOB prices for Pennsylvania coal ranges of 61.43 – 82.71 USD/MT between 2011 and 2012 directly impeach the aberrationally high AUV of 333 USD/MT reported in the Thai GTA import data.

- The contemporaneous Ukraine GTA import data is the most reliable SV because Ukraine is economically comparable, a significant producer of comparable merchandise, and the Ukraine GTA data are corroborated by UNComtrade data, domestic anthracite coal prices, Indian and South African GTA anthracite coal import data, and it is based on a large import quantity which satisfies the criteria of broad market average.

Jacobi's Comments

- If the Department does not use AR5 Philippine GTA SV for the final remand, it must change its conclusion that the Thai GTA anthracite coal import data represent the best available information.
- The Department must select the best SV for the actual input being consumed, which for Jacobi's suppliers is "raw lump anthracite coal from the mine." Evidence on the record demonstrates that the Thai GTA import data are not the best available information because:
    - The Thai GTA data are from a basket category and, without positive evidence of what specific types of coal the data cover, the Department cannot reasonably conclude that the Thai import data are specific to the type of anthracite coal consumed by Jacobi's suppliers. What is actually imported under a basket HS category may vary from year to year as demonstrated by the example of the variance between the AR5 and AR6 Philippine GTA data, the latter of which the Department rejected as not specific to the input. Relying on a basket category when product-specific data is available is inappropriate.[163]
    - The record demonstrates that despite the Thai GTA import data reporting imports from Australia, Australia export data indicate no exports to Thailand during the same

[163] Jacobi cites to *Jinan Yipin Corp., Ltd. v. United States*, 800 F. Supp. 2d 1226, 1296 (CIT 2011) ("Commerce has repeatedly stated that it is "inappropriate" to rely on import statistics based on a broad, "basket" tariff provision when more representative surrogate data are available").

period. Further, the overall AUV for Australian exports to Thailand ($113.01/MT) is significantly lower than the corresponding import AUV ($530/MT) reflected in the GTA Thai import data. UNComtrade data for the four years preceding the POR demonstrate that the AUV for Australian exports was never higher than $173/MT.

- Malaysian GTA export data demonstrate that there were no exports from Malaysia to Thailand. Additionally, the overall AUV for Malaysian exports ($371.12/MT) varies significantly from the corresponding Thai GTA import AUV ($105,100/MT) reflected for Malaysian-sourced product reported in the GTA Thai data.
- GTA Ukraine export data demonstrate that, during the POR, the AUV of exports from Ukraine to Thailand ($94/MT) as well as the overall AUV for all of the Ukrainian exports ($95.15/MT) varies significantly from the Ukrainian AUV reported in the Thai GTA import data ($300/MT). Additionally, UNComtrade data demonstrate that the average AUV for Ukraine's exports under HS 2701.11 for the four years before the POR was never higher than $109/MT. Because the specific AUV from Ukraine to Thailand is corroborated by both the AUV of total Ukraine exports and by UNComtrade data, substantial evidence demonstrates that the Thai import data are unreliable.
- The quantities and values of export data as compared to import data for Thailand are dramatically different, such that this is not merely an argument about slight mismatching.

- The Department failed to comply with the Court's instruction to carefully consider evidence impeaching the reliability of the data from Thailand because the Department simply states that it does not expect export and import data to match on a one-to-one ratio. Its reasoning

for dismissing arguments regarding exports to Thailand is insufficient.

- In a report titled *2013 National Trade Estimate Report on Foreign Trade Barriers*, the United States Trade Representative ("USTR") has questioned the reliability of Thai import values ("2013 USTR Report"). Specifically, the report states, among other findings, that: "{t}he U.S. Government and industry also have expressed concern about the inconsistent application of Thailand's transaction valuation methodology and reports of repeated use of arbitrary values by the Customs Department." The Department should take the USTR's concerns into consideration and conclude the Thai GTA data is unreliable.

Department's Position:

We disagree with Carbon Activated's contention that we should find the AR6 Thai anthracite coal SV unreliable because we made the *AR8 Carbon Prelim* determination using different comparison data points. Carbon Activated argues the Department should not use AR6 Thai import data because in the *AR8 Carbon Prelim*, the Department determined that AR5, AR6, AR7 and AR8 Thai import data for anthracite coal were unreliable because they were "unreliably volatile" and should not be used to value anthracite coal.[164] Further, Carbon Activated contends it is arbitrary for the Department to find in one review that the Thai import data for AR6 is unreliable but also to find in this remand that AR6 Thai import data is reliable.

As an initial matter, the Department's long-standing practice, upheld by the Court, is to treat each segment of an antidumping proceeding, including the antidumping investigation and the administrative reviews that may follow, as independent proceedings with separate records, which lead to independent determinations.[165] In the *AR8 Carbon Prelim*, the Department preliminarily determined that Bulgaria, Ecuador, Mexico, Romania, South Africa, and Thailand

[164] Carbon Activated cites to *AR8 Carbon Prelim*, and accompanying PDM at 25.
[165] *See E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32 (January 29, 1998).

are at the same level of economic development as the PRC based on per capita 2014 GNI data and that they were also significant producers of comparable merchandise.[166] In this remand redetermination, the Department considers Colombia, Costa Rica, Indonesia, the Philippines, Thailand, and South Africa to be at the same level of economic development as the PRC.[167] When the Department undertook the anthracite coal analysis in the *AR8 Carbon Prelim*, the Department compared historic anthracite coal values with the countries at the same level of economic comparability which were, with the exception of South Africa and Thailand, different than the potential surrogate countries of the sixth administrative review.[168] Accordingly, because the comparison countries are different between these two segments of this proceeding, the results of such an anthracite coal analysis are necessarily different. Therefore, because the *AR8 Carbon Prelim* used different comparison data points, we do not find the Department's preliminary analysis in a subsequent administrative review involving different potential surrogate countries and different record evidence to impugn the reliability of the Thai data on the record of this administrative review. Therefore, we continue to find the AR6 Thai data suitable for this remand redetermination. The Department undertook a similar analysis as that taken in the *AR8 Carbon Prelim* in this remand redetermination as it pertains to the sixth review. While the record of this review does not contain the same quantity of historical GTA for all the potential surrogate countries, using the available GTA import data we have found that, for the POR, the Thai GTA AUV falls between Colombia's AUV, which represents the upper tier of AUVs, and South Africa's and Ukraine's which falls below Thailand's AUV.[169] With respect to GTA historical

[166] *See AR8 Carbon Prelim* and accompanying PDM at 13-15.
[167] *See AR6 Preliminary Results* and accompanying PDM at 14, unchanged in *AR6 Final Results*. *See also* Surrogate Country Memo.
[168] *See AR8 Preliminary Results* and accompanying PDM at 25.
[169] *See* Jacobi's SV Submission, dated November 13, 2013, at Exhibit 3. The Department did not use the contemporaneous AUVs of Indonesia or the Philippines in this analysis because we found the SV for those countries are unreliable during AR6.

data, for the years prior to the POR (*i.e.*, 2009, 2010, 2011), Thailand's AUV maintains a gradual increase in line with Indonesia's and the Philippine's AUV.[170] Thus, for AR6, Thailand's AUV demonstrates no volatile behavior during the POR.

Further, we disagree with Cherishmet that we should weigh the relative total quantity of imports underlying GTA HS 2701.11 in each country, and quantity of production in the case of U.S. EIA domestic production. As we stated above, when considering what constitutes the best available information, the Department considers several criteria, including whether the SV data are contemporaneous, publicly available, tax and duty exclusive, represent a broad market average, and specific to the input.[171] There is no hierarchy for applying the above-stated principles.[172] The Department's preference is to satisfy the breadth of the aforementioned selection criteria.[173] Moreover, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs.[174] The Department must weigh the available information with respect to each input value and, on a case-by-case basis, make a product-specific decision as to what constitutes the "best" available SV for each input.[175] Cherishmet's argument suggests that the Department necessarily must consider import quantity in its SV selection criteria. The Department does not generally consider import quantity in its SV selection criteria, except in isolated cases where the

[170] *See* Jacobi's SV Submission, dated November 13, 2013, at Exhibit 3. Specifically, the anthracite coal SV for Thailand was 0.46, 0.62, and 0.73 kg/USD for the 2009, 2010, and 2011, respectively.
[171] *See e.g.*, *Lined Paper*, 71 FR at 53079, and accompanying IDM at Comment 3; *Mushrooms*, 71 FR at 40477, and accompanying IDM at Comment 1.
[172] *See Mushrooms*, 71 FR at 40477, and accompanying IDM at Comment 1.
[173] *See, e.g., Shrimp 2011*, 76 FR at 51940, and accompanying IDM at Comment 2.
[174] *See Mushrooms*, 71 FR at 40477, and accompanying IDM at Comment 1; *see also Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002), and accompanying Issues and Decision Memorandum at Comment 2.
[175] *See, e.g., Mushrooms*, 71 FR at 40477, and accompanying IDM at Comment 1.

Department has sought to find commercial quantities[176] or select among competing SVs from secondary surrogate countries.[177] As we note above, in this instance we find it is more appropriate to use significant production of comparable merchandise in selecting among relatively equal SV sources. While Thailand's imports of 681,000 kg of anthracite coal in AR6 is lower than the import quantities for South Africa and Ukraine, the Thai quantity of imports is nevertheless a commercial quantity and more than adequate for consideration as a SV. Further, there is no record evidence demonstrating that the Thai import data does not reflect a commercial quantity.

Certain parties revisit their arguments that export AUVs from Australia, Malaysia, and Ukraine vary significantly from their import AUVs into Thailand. In addition, parties reiterate arguments that Australian and Malaysian export data on the record indicate no exports of anthracite coal to Thailand from these countries during the POR. As noted above, when determining whether data are aberrational, interested parties must provide specific evidence showing the value is aberrational and provide appropriate benchmarking data.[178] Although parties have argued that certain countries' export data differ from the Thai import data for the same period, we note again that the Department does not expect export and import data to match on a one-to-one ratio.[179] In addition, although the Department does not typically use export data to impeach import data, it may consider corroborative evidence from trade information service providers, such as PIERS and ZEPOL, to disregard GTA import data where there is a one-to-one

[176] *See Shrimp 2011*, and accompanying IDM at Comment 4; *see also Glycine*, and accompanying IDM at Comment 1.
[177] *See Chlor Isos from the PRC 2016*, and accompanying IDM at Comment 1.
[178] *See Carbazole*, and accompanying IDM at Comment 6.
[179] *See Calgon* at 22; *see also PET Film*, and accompanying IDM at Issue 2(I)(A).

match between the corroborative data and the GTA import data.[180] Therefore, we find no reason to disregard the Thai GTA import data for the reason that GTA export data are not a one-to-one match. Differences between export data from one country and import data for another can be explained by temporal differences, product mix differences, differences in levels of sales (FOB export versus cost-insurance-freight CIF import pricing) and differences in types of entry (customs territory versus special trade zones) that exist between the two sources of trade data. Moreover, there is no information on the record which demonstrates that the GTA export data from Australia, Malaysia, and Ukraine are more reliable than the Thai GTA import data. While the GTA export data and Thai GTA import data for these countries differ, parties offer no reasons for the differences except that the values do not match. The record contains no information which explains the discrepancy between the Australian, Malaysian and Ukrainian export data and the Thai import data, nor does the record demonstrate that the imports into Thailand are anything other than what the Thai HS heading "Anthracite Coal, Not Agglomerated" describes. Therefore, it is appropriate to rely on the Thai import data as reported and consider these entries to be anthracite coal; to assume otherwise would be speculative.

Jacobi points to the 2013 USTR Report in questioning the reliability of Thai import values. Although the 2013 USTR Report is not on the record of this review,[181] we have considered similar arguments regarding Thai import data in other cases.[182] We have found, and

[180] *See Remand Opinion and Order* at 17-18 (holding that it was appropriate for Department to rely on PIERS and ZEPOL data to find the contemporaneous Philippine GTA import data not specific to anthracite coal input). The CIT has sustained the Department's authority to use trade service information to corroborate or discard information derived from GTA. *See Globe Metallurgical, Inc. v. United States*, 33 CIT 435, 439-440 (CIT 2009) (sustaining decision not to rely on "infodrive" data because Department could not discern percentage of total imports captured by those data).

[181] *See QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("the burden of creating an adequate record lies with {interested parties} and not with {the Department}") (citations omitted).

[182] *See Certain Steel Threaded Rod From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 69938 (November 12, 2015), and accompanying IDM at Comment 6.C;

we also find here, that Jacobi has failed to provide any specific, documentary evidence to demonstrate how any of the Thai import data submitted for this review were manipulated by Thai Customs. In other words, although Jacobi's quoted excerpts of this report might remark on the general state of Thai Customs' practices, Jacobi has pointed to no evidence on the record which demonstrates that the specific SV data relied on by the Department in this remand redetermination is the result of the alleged Thai Customs practices and thus unreliable.

Further, we disagree that Thai GTA imports under HS code 2701.11 "Anthracite Coal, Not Agglomerated" are aberrational when compared with UNComtrade export data. As noted above, when determining whether data are aberrational, the Department has found that the existence of higher prices alone does not necessarily indicate that the price data are distorted or misrepresentative, and thus is not a sufficient basis upon which to exclude a particular value's suitability for use as a SV.[183] Interested parties must provide specific evidence showing the value is aberrational. If a party presents sufficient evidence to demonstrate a particular value may be aberrational, and therefore unreliable, the Department will examine all relevant price information on the record, including any appropriate benchmark data, in order to accurately value the input in question. With respect to benchmarking, the Department may examine import data from the previous years for the potential surrogate countries for a given case, to the extent such import data are available, and/or examine data from the same HS category for the surrogate country over multiple years to determine if the current data appear aberrational compared to historical values.[184]

Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014, 80 FR 61172 (October 9, 2015), and accompanying IDM at Comment 1

[183] *See Vietnam Shrimp 2011*, and accompanying IDM at Comment 1.E; *see also 1,1,1,2-Tetrafluroethane From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 62597 (October 20, 2014), and accompanying IDM at Comment 10.

[184] *See Carbazole*, and accompanying IDM at Comment 6.

While the POR value of Thai GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" is higher than the GTA import data for anthracite coal from South Africa and Ukraine, parties have not provided South African and Ukrainian GTA import data from years previous to the POR on the record which would permit analysis as to whether the POR Thai value is unreliable vis-à-vis its historical value.

Moreover, we disagree with Jacobi's contention that the Department cannot conclude that the Thai import data are specific to the type of anthracite coal consumed by Jacobi's suppliers. Jacobi argues that the Thai GTA data is a basket category and relying on basket-categories when product-specific data is available is inappropriate.[185] While we agree with Jacobi's contention that we generally do not rely on basket-categories when product-specific data is available, we note that the record contains no evidence that Thai imports under HS code 2701.11 "Anthracite Coal, Not Agglomerated" are not specific to the input used by Jacobi's suppliers. As the Court has found, it is the responsibility of the parties to establish an adequate record.[186] For the Department to make a determination regarding the specificity of the Thai GTA anthracite coal imports, the parties would have needed to place that information on the record. Such information does not exist on the record. Further, Jacobi argues for the AR5 Philippine GTA import data under HS number 2701.11: "Anthracite Coal, Not Agglomerated," claiming that this HS category is specific to the input used by its suppliers,[187] while Thai imports under HS code 2701.11 "Anthracite Coal, Not Agglomerated" somehow is not.[188] Indeed, all of the potential SV sources for anthracite coal being considered in this remand redetermination that are based on

[185] Jacobi cites to *Jinan Yipin*, 800 F. Supp. 2d at 1296 ("Commerce has repeatedly stated that it is "inappropriate" to rely on import statistics based on a broad, "basket" tariff provision when more representative surrogate data are available").
[186] *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (providing that "the burden of creating an adequate record lies with {interested parties} and not with Commerce").
[187] *See* Jacobi's Draft Remand Comments, dated April 18, 2016, at 8.
[188] *Id.* (explaining that the AR5 Philippine GTA data specificity is undisputed).

GTA data (*i.e.*, Thailand, South Africa, Ukraine, and Colombia) are for HS code 2701.11, which is a basket category. Accordingly, because the heading of the Thai GTA import data is "Anthracite Coal, Not Agglomerated" and no information exists on the record which demonstrates that the Thai import data is anything other than anthracite coal, we continue to find that the Thai GTA import data under HS number 2701.11: "Anthracite Coal, Not Agglomerated" is specific to the input used by the mandatory respondents.

Issue 5: Colombian SV

Cherishmet's Comments:

- The Department should not use Colombian GTA import data because they suffer similar deficiencies like the Thai GTA import data for anthracite coal. Specifically, the Colombian GTA import price is directly impeached by the U.S. price of anthracite coal. Further, the UNComtrade export data for Belgium demonstrate that the overall export AUV for those data is significantly lower than the Colombian import AUV of Belgian anthracite coal, which demonstrates the Colombian GTA data are also unreliable. Commerce also failed to test the reliability of the Colombian GTA by testing its overall AUV.

Department's Position:

We disagree with Cherishmet's contention that the Colombian GTA import data are unreliable. As noted above, when determining whether data are aberrational, the Department has found that the existence of higher prices alone does not necessarily indicate that the price data are distorted or misrepresentative, and thus is not a sufficient basis upon which to exclude a particular SV. Interested parties must provide specific evidence showing the value is aberrational. If a party presents sufficient evidence to demonstrate a particular SV may be aberrational, and therefore unreliable, the Department will examine all relevant price information

on the record, including any appropriate benchmark data, in order to accurately value the input in question. With respect to benchmarking, the Department may examine import data from the previous years for the potential surrogate countries for a given case, to the extent such import data are available, and/or examine data from the same HS category for the surrogate country over multiple years to determine if the current data appear aberrational compared to historical values.[189]

While the value of Colombian GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" may be higher in comparison to the GTA import data for anthracite from other countries, parties have not provided any Colombian import data from years previous to the POR on the record which would demonstrate the Colombian SV is unreliable. While certain parties argue that the Belgian and U.S. export AUVs differ significantly from their import AUVs into Colombia, we note that the Department does not expect export and import data to match on a one-to-one ratio. Differences between export data from one country and import data for another can be explained by temporal differences, product mix differences, differences in levels of sales, (FOB export versus CIF import pricing) and differences in types of entry (customs territory versus special trade zones) that exist between the two sources of trade data. Further, the record does not contain information which demonstrates that Colombian GTA import data are aberrant in relation to prior years, or in relation to the other anthracite coal import values recorded in the GTA for other potential surrogate countries. Accordingly, because Colombia is at the same level of economic development as the PRC,[190] a significant producer of comparable merchandise,[191] and there is no information on the record which demonstrates that

[189] *See Carbazole*, and accompanying IDM at Comment 6.
[190] *See* Surrogate Country Memo.
[191] *See* Jacobi's Surrogate Country Selection Comments, dated October 23, 2013, at Attachment A; *see also* Cherishmet's Surrogate Country Selection Comments, dated October 23, 2013.

Colombian GTA import data under HS code 2701.11: "Anthracite Coal, Not Agglomerated" are unreliable or otherwise unusable, these data are a potential source with which to value the respondents' anthracite coal input.

FINAL RESULTS OF REDETERMINATION

We have implemented all changes discussed above. First, we determine that GTA import data under Thai HS code 2701.11: "Anthracite Coal, Not Agglomerated," constitutes the best available information to value Cherishmet's and Jacobi's anthracite coal. Accordingly, Cherishmet's[192] and Jacobi's[193] final margin has been revised to $0.52/kilogram[194] and $0.51/kilogram,[195] respectively.[196] Second, under respectful protest, we have assigned Shanxi

[192] In the first administrative review, the Department found Beijing Pacific Activated Carbon Products Co., Ltd., Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., and Ningxia Guanghua Activated Carbon Co., Ltd. are a single entity and, because there were no changes to the facts which supported that decision, we continued to find these companies to be part of a single entity in subsequent reviews. Because there have been no changes to the facts that supported that decision in the *AR6 Final Results*, we are continuing to treat the companies as a single entity in this remand redetermination as well. *See Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 FR 21317, 21319 (May 7, 2009), unchanged in *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995, 57998 (November 10, 2009).

[193] In the third administrative review, the Department found Jacobi, Tianjin Jacobi International Trading Co. Ltd., and Jacobi Carbons Industry (Tianjin) are a single entity and, because there were no changes to the facts which supported that decision, we continued to find these companies part of a single entity in the fourth and fifth administrative reviews. Because there have been no changes to the facts that supported that decision in the *AR6 Final Results*, we are continuing to treat the companies as a single entity in this remand redetermination as well. *See Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review*, 76 FR 67142, 67145 n.25 (October 31, 2011); *see also Certain Activated Carbon From the People's Republic of China; 2010-2011; Final Results of Antidumping Duty Administrative Review*, 77 FR 67337, 67338 n.22 (November 9, 2012).

[194] *See* Memorandum to the File, through Catherine Bertrand, Program Manager, AD/CVD Operations, Office V, from Bob Palmer, Senior Trade Analyst, AD/CVD Operations, Office V, re: "Remand Redetermination Results Analysis Memorandum for Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. in the Sixth Antidumping Duty Administrative Review of Certain Activated Carbon the People's Republic of China," dated April 6, 2016.

[195] *See* Memorandum to the File, through Catherine Bertrand, Program Manager, AD/CVD Operations, Office V, from Bob Palmer, Senior Trade Analyst, AD/CVD Operations, Office V, re: "Remand Redetermination Results Analysis Memorandum for Jacobi Carbons AB ("Jacobi") in the Sixth Administrative Review of Certain Activated Carbon from the People's Republic of China," dated April 6, 2016.

[196] In the second administrative review, the Department determined that it would calculate per-unit assessment and cash deposit rates for all future reviews. *See Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 FR 70208, 70211 (November 17, 2010); *see also AR6 Final Results*, 79 FR at 70165 n.29.

DMD a separate rate, which will pertain to entries during the period of review that were exported from the PRC to the United States by Shanxi DMD and imported by Carbon Activated.[197]

Additionally, for this remand redetermination, we are recalculating a margin for those separate rate companies whose entries are subject to this litigation in the same manner in which we calculated the margin for these companies in the *AR6 Final Results*. In the *AR6 Final Results*, and consistent with our practice,[198] we determined that using the ranged total sales quantities reported by the mandatory respondents from the public versions of their submissions to calculate a weighted-average margin is more appropriate than calculating a simple average margin.[199] These publicly available figures provide the basis upon which we can calculate a margin, which is the best proxy for the weighted-average margin based on the calculated net U.S. sales values of the mandatory respondents without the possibility of disclosing any business proprietary information. We find that this approach is more consistent with the intent of section 735(c)(5)(A) of the Act and our use of that statutory provision as guidance when we establish the rate for respondents not examined individually in an administrative review.[200] We add that no parties commented on this methodology for calculating the separate rate in the underlying *AR6 Final Results*[201] or in response to the Draft Remand Results.

Thus, consistent with the methodology used in the *AR6 Final Results* for calculating a margin for the separate rate companies, we calculated a weighted-average margin of

[197] We note that Carbon Activated, an importer, challenged the application of the PRC-wide rate to Shanxi DMD in this litigation, and that Carbon Activated's preliminary injunction covers entries subject to this review that "were exported from the People's Republic of China to the United States by Shanxi DMD Corporation and imported by Carbon Activated Corporation." *See Carbon Activated Corporation v. United States*, Court No. 14-00325, Order (December 11, 2014) (consolidated into Consol. Court No. 14-00326). Consequently, any change to Shanxi DMD's rate in this remand will only affect entries subject to the preliminary injunction.
[198] *See AR6 Final Results*, 79 FR at 70164.
[199] *See* Jacobi's public version of its supplemental Section A questionnaire response, dated August 21, 2013, at Exhibit 1; *see also* Cherishmet's Public Version of Exhibit A-1 for the Section A Response, dated August 30, 2013.
[200] *See, e.g., Vietnam Shrimp 2011* at 56160.
[201] *See AR6 Final Results*, 79 FR at 70164.

$0.51/kilogram based on the calculated U.S. sales quantities of the mandatory respondents.[202] The Separate Rate companies receiving this revised separate rate in this proceeding are: 1) Calgon Carbon (Tianjin) Co., Ltd.; 2) Datong Juqiang Activated Carbon Co., Ltd.; 3) Datong Municipal Yunguang Activated Carbon Co., Ltd.; 4) Jilin Bright Future Chemicals Company, Ltd.; 5) Ningxia Huahui Activated Carbon Co., Ltd.; 6) Ningxia Mineral and Chemical Limited; 7) Shanxi Sincere Industrial Co., Ltd.; and 8) Tianjin Channel Filters Co., Ltd. Because we are assigning the separate rate to Shanxi DMD in this remand, entries made by Shanxi DMD and imported by Carbon Activated Corporation will likewise be assigned this revised separate rate.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

25 MAY 2016
Date

[202] For further discussion regarding this issue, *see* the "Memorandum to the File from Bob Palmer, International Trade Specialist, Office V Re: Calculation of Separate Rate," dated April 6, 2016.