

January 5, 2009

MEMORANDUM TO: Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration

FROM: Stephen J. Claeys  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in  
the Less-Than-Fair-Value Investigation of Small Diameter  
Graphite Electrodes from the People's Republic of China (PRC)

### Summary

We have analyzed the case and rebuttal briefs submitted by the petitioners<sup>1</sup> and the respondents<sup>2</sup> in this investigation. As a result of our analysis, we propose making changes to our preliminary determination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a list of the issues in this investigation for which we received comments from interested parties:

**Comment 1: Whether Fushun Jinly's Dumping Margin Should be Based on Adverse Facts Available**

**Comment 2: Whether Graphite Connecting Pins are Covered by the Scope of the Investigation**

**Comment 3: Whether the Fangda Group's Dumping Margin Should be Based on Adverse Facts Available**

**Comment 4: Whether Critical Circumstances Exist for the Fangda Group, Fushun Jinly, the Separate Rate Applicants, and the PRC-Wide Entity**

We also received comments from interested parties regarding the appropriate surrogate values for silica and calcined petroleum coke, and whether it is appropriate to include the cost of plastic foam in total packing costs. As explained below, in the final determination, we did not calculate dumping margins for the mandatory respondents but instead based their dumping margins on

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<sup>1</sup> The petitioners in this investigation are SGL Carbon LLC and Superior Graphite Co.

<sup>2</sup> The respondents that submitted comments are: Fushun Jinly Petrochemical Carbon Co., Ltd. (Fushun Jinly) and the Fangda Group, which includes Fangda Carbon New Material Co., Ltd. (Fangda Carbon), Fushun Carbon Co., Ltd. (Fushun Carbon), Chengdu Rongguang Carbon Co., Ltd. (Chengdu Rongguang), Beijing Fangda Carbon Tech Co., Ltd. (Beijing Fangda) and Hefei Carbon Co. Ltd. (Hefei Carbon).

total adverse facts available (AFA). Since we did not use the surrogate values or packing cost at issue to calculate the final dumping margins in this case, we have not addressed interested parties' comments regarding the inputs noted above.

## **Discussion of the Issues**

### **Comment 1: Whether Fushun Jinly's Dumping Margin Should be Based on Adverse Facts Available**

On August 25, 2008, Fushun Jinly filed an untimely and unsolicited submission consisting of substantial revisions to its factors of production (FOP) database, and other previously undisclosed information. Accordingly, in its September 9, 2008, letter to Fushun Jinly, the Department rejected the new database and other related documents for being untimely filed new factual information. In that letter, the Department indicated that this new and untimely information also raised serious questions as to the credibility of the previously reported FOP data, and informed the company of the Department's intention not to verify any of Fushun Jinly's previously submitted information. See letter from Abdelali Elouaradia, Director, AD/CVD Operations, Office 4, to Lizbeth Levinson, at Garvey Shubert Barer, dated September 9, 2008, (September 9, 2008, Letter).

Fushun Jinly argues that by rejecting its new and unsolicited information, the Department abused its discretion in two ways. First, Fushun Jinly maintains that the Department's strict adherence to the normal deadline for accepting new factual information is inappropriate here since the Department scheduled verifications in this case so close to the preliminary determination that it effectively precluded Fushun Jinly from providing timely information in response to the Department's preliminary determination. Fushun Jinly contends that the untimely submission was critical because of the Department's unexpected and unilateral decision to exclude pins from the scope of the investigation in its preliminary determination. Second, Fushun Jinly claims that the Department's decision not to verify Fushun Jinly was based entirely upon the information contained in the post-preliminary determination submission – the very submission which the Department specifically rejected and excluded from the administrative record. Accordingly, Fushun Jinly argues that if the Department determines that, at this stage of the investigation, there is insufficient time in which to verify the questionnaire responses that Fushun Jinly submitted prior to the preliminary determination, then for purposes of the final determination, the Department should treat Fushun Jinly as a separate-rate respondent, especially since it cooperated fully in this investigation and submitted complete information establishing its entitlement to a separate rate in the preliminary determination.

The petitioners argue that the record shows that Fushun Jinly submitted an entirely new, untimely FOP database that reflected: (1) previously requested separate input quantities for high power electrodes and connecting pins; (2) previously requested offsets for by-product sales; and (3) significant reductions to previously reported consumption quantities for the graphitization process of electrodes. Moreover, the petitioners maintain that, in explaining the untimely database, Fushun Jinly submitted information that indicated: (1) contrary to its previous claim, Fushun Jinly may have been able to report factor data on a basis closer to the product-specific characteristics outlined by the Department than what it used in previous submissions; (2) it may

have failed to report data for all subcontractors used in the graphitization process; and (3) the subcontractors who performed graphitization would not provide any documents to support the input quantities reported by them, a fact which had not been previously disclosed to the Department. According to the petitioners, this additional information raises questions as to the reliability, accuracy, and verifiability of what had been reported to the Department.

Furthermore, the petitioners argue that although Fushun Jinly claims that the Department's preliminary scope determination changed the reporting requirements with respect to graphite electrodes and connecting pins, this claim is not valid because early in this investigation the Department asked the respondents to report the factors of production for electrodes and pins separately. Thus, the petitioners assert that the Department properly rejected Fushun Jinly's new FOP database as untimely and properly determined not to verify Fushun Jinly. Therefore, the petitioners argue, given that the Department found Fushun Jinly's responses to be unverifiable, there is no reliable basis for granting Fushun Jinly a separate rate in the final determination. Accordingly, the petitioners assert that the circumstances of this investigation fully support a finding that Fushun Jinly has failed to cooperate to the best of its ability and that application of total AFA is warranted. In this case, Fushun Jinly failed to report complete and accurate FOP data, despite numerous requests by the Department in the original and supplemental questionnaires. In its untimely submission and subsequent submissions explaining the untimely submission, Fushun Jinly: (1) revealed for the first time that it sold by-products during the POI, although it had repeatedly stated that it reused its by-products; (2) admitted for the first time that the subcontractors who performed graphitization would not provide any documents to support the FOP data they had submitted; (3) reported substantial reductions to consumption quantities for major graphitization inputs consumed by the same subcontractors whose records could not be verified; (4) provided company records which call into question the number of subcontractors reportedly used in the graphitization process during the POI, and whether Fushun Jinly accurately and fully reported to the Department its FOP data for such a process; (5) provided production documents indicating that it could have reported the FOP data not only based on power level of the electrodes, but also based on the diameter and length of the graphite electrodes, which it had repeatedly denied it was able to do prior to the preliminary determination; and (6) reported FOP data for certain graphite electrodes and connecting pins separately, contrary to its repeated contention that it could not do so. See September 9, 2008, Letter.

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

Section 776(a)(2) of the Tariff Act of 1930, as amended (the Act) provides that if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act allows the Department, subject to section 782(e) of the Act, to disregard all or part of a deficient or untimely response from a respondent. Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it

cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Furthermore, section 776(b) of the Act states that if the Department “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission . . . , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” See also Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H.R. Rep. No. 103-316, Vol. 1 at 870 (1994).

On August 25, 2008, after the preliminary determination, and on the same day that the verification of the Fangda Group began, Fushun Jinly filed untimely and unsolicited new information consisting of substantial revisions to its FOP database, and other previously undisclosed information. In its untimely submission and subsequent submissions explaining its initial untimely submission,<sup>3</sup> Fushun Jinly: (1) revealed for the first time that it sold by-products during the POI, although it had repeatedly stated that it reused its by-products;<sup>4</sup> (2) reported for the first time that the subcontractors who performed graphitization would not provide any documents to support the FOP data that they had submitted;<sup>5</sup> (3) reported substantial reductions to the consumption quantities previously reported for major inputs used by the subcontractors who performed graphitization; (4) provided company records which call into question the number of subcontractors reportedly used in the graphitization process during the POI, and whether Fushun Jinly accurately and fully reported to the Department its FOP data for such a process;<sup>6</sup> (5) provided production documents indicating that it could have reported the FOP data using control number (CONNUM) characteristics in addition to power level; which it had repeatedly denied it was able to do prior to the preliminary determination;<sup>7</sup> and (6) reported FOP data for graphite electrodes and connecting pins separately, although it previously indicated it could not do so and it failed to provide such information when it had been requested by the Department.<sup>8</sup>

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<sup>3</sup> The subsequent submissions are dated August 27, 2008, and September 3, 2008.

<sup>4</sup> See, e.g., Fushun Jinly’s June 2, 2008, supplemental questionnaire response at D-14 (listing by-products generated during production and stating that “most of them are reintroduced into the production . . .); see also Fushun Jinly’s July 31, 2008 supplemental questionnaire response at D-8 (identifying by-products and again stating that these by-products are reintroduced into the production process). Fushun Jinly never stated that it sold by-products until after the preliminary determination.

<sup>5</sup> See September 9, 2008 Letter.

<sup>6</sup> See *id.* See also Fushun Jinly’s July 10, 2008, supplemental questionnaire response, page 8, Appendix S3-1 and July 31, 2008 supplemental questionnaire response, page D10, Appendix S4-D6 (in which Fushun Jinly responded to Departmental requests for the tollers’ FOP data by providing data which it ultimately indicated was not correct) and Fushun Jinly’s June 2, 2008 supplemental questionnaire response, at page D-3 (in which Fushun Jinly stated that it “. . . outsourced its graphitization process to two outside processors during the POI”).

<sup>7</sup> See September 9, 2008 Letter. See also Fushun Jinly’s July 31, 2008, supplemental questionnaire response, pages D-4 (“{i}n Fushun Jinly’s accounting records, the cost for electrodes and connecting pins are allocated based on the power level. . . . Thus, we cannot report the CONNUM-specific FOPs.”), D-5 (“we could only calculate the per-unit consumption for {power levels}.”), and D-7 (“Fushun Jinly only reports per-unit consumption quantities by power level . . .”).

<sup>8</sup> See, e.g., the Department’s June 19, 2008, supplemental questionnaire, in which the Department requested that Fushun Jinly “. . . revise the FOP database by separately identifying and reporting the FOP used in producing the

The record shows that Fushun Jinly failed to provide important FOP data by the deadlines established by the Department prior to the preliminary determination for submitting such data. Specifically, Fushun Jinly failed to submit the following data in a timely fashion: (1) offset data for by-product sales; (2) accurate consumption quantities for major inputs consumed in graphitization; and, (3) separate factor quantities for high power graphite electrodes and connecting pins. The Department had requested that Fushun Jinly describe the disposition of its by-products in the April 7, 2008, questionnaire.<sup>9</sup> Further, the Department had requested that Fushun Jinly report all factor quantities (including those for graphitization) in Section D of the April 7, 2008, questionnaire, and later specifically requested factor quantities for, and additional information regarding, graphitization in supplemental questionnaires dated June 19, 2008, and July 23, 2008.<sup>10</sup> Moreover, in the June 19, 2008, supplemental questionnaire, the Department requested that Fushun Jinly provide production records for the tollers who graphitized the electrodes.<sup>11</sup> Also, the Department had requested that Fushun Jinly report separate factor quantities for graphite electrodes and connecting pins in the supplemental questionnaires dated June 19, 2008, and July 23, 2008.<sup>12</sup> Despite these requests, it was not until August 25, 2008, which was 10 days after the results of the preliminary determination had been announced, that Fushun Jinly reported sales of by-products, separate factor quantities for high power graphite electrodes and connecting pins, and significant reductions to the factor quantities for major graphitization inputs. By providing this information at such a late stage of the investigation, Fushun Jinly prevented the Department and petitioners from analyzing the data prior to verification. Moreover, taking time to analyze the untimely data would have resulted in a material delay in the proceeding. Additionally, Fushun Jinly acknowledged that it could not obtain documents to support the factor quantities that it reported for graphitization. Thus, these quantities could not be verified. Therefore, given that record evidence calls into question the overall accuracy and completeness of Fushun Jinly's responses, we find that the Department must resort to the use of FA. Thus, pursuant to sections 776(a)(2)(A) (withholds information requested by the Department), (B) (fails to provide information by the deadline), (C) (significantly impedes a proceeding) and (D) (provides information that cannot be verified), of the Act, we have determined that it is appropriate to base Fushun Jinly's dumping margin on FA.

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connecting system. Specifically, please revise the previously submitted FOP database by excluding the factors of production for the connecting system. Report the factors of production for each type of connecting system in a separate FOP database." In response to this request, Fushun Jinly stated that it ". . . does not record the cost of electrodes and connecting pins separately in the accounting books and records kept in the normal course of business. Fushun Jinly only separates the grade of the electrodes. For example, the cost for HP electrode and connecting pin are recorded together." See Fushun Jinly's July 10, 2008, supplemental questionnaire response at page 10. See also the Department's July 23, 2008, supplemental questionnaire Section D portion, question XI A and Fushun Jinly's July 31, 2008, supplemental questionnaire response at page D-4.

<sup>9</sup> See Section D of the Department's April 7, 2008, questionnaire at field 6.1.

<sup>10</sup> See Section D of the Department's April 7, 2008, questionnaire on page D-1 ("{t}he reported amounts should reflect the factors of production used to produce one unit of the merchandise under consideration"); see also the June 19, 2008, supplemental questionnaire, Section D portion, "Reported Factors of Production" question 7 and the July 23, 2008, supplemental questionnaire Section D portion, question XII E.

<sup>11</sup> See the June 19, 2008, supplemental questionnaire, Section D portion, "Reported Factors of Production" question 7.

<sup>12</sup> See the June 19, 2008, supplemental questionnaire, Section D portion, "Connecting Systems" question 1 and the July 23, 2008, supplemental questionnaire Section D portion, question XI A.

To examine whether the respondent “cooperated” by “acting to the best of its ability” under section 776(b) of the Act, the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins. See, e.g., Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819-53820 (October 16, 1997). The Court of Appeals for the Federal Circuit (CAFC), in Nippon Steel Corporation v. United States, 337 F.3d 1373, 1380 (Fed. Cir. 2003) (Nippon Steel), provided an explanation of the “failure to act to the best of its ability” standard. Specifically, the CAFC held that the Department need not show intentional conduct existed on the part of the respondent, but merely that a “failure to cooperate to the best of a respondent’s ability” existed (*i.e.*, information was not provided “under circumstances in which it is reasonable to conclude that less than full cooperation has been shown.”) See id. The CAFC further explained that the statute requires a factual assessment concerning “the degree to which the respondent cooperates in investigating (its) records and in providing Commerce with the requested information.” See Nippon Steel, 337 F.3d 1373, 1383.

We find that, within the meaning of section 776(b) of the Act, Fushun Jinly failed to cooperate by not acting to the best of its ability to comply with the Department’s requests for information, and that the application of total AFA is warranted. In its questionnaires, the Department explained the manner in which the FOP data should be reported, and requested that Fushun Jinly report its FOP data fully and accurately. Specifically, the Department requested that Fushun Jinly fully and accurately report the disposition of by-products, the consumption quantities of all inputs for each product using the CONNUM characteristics, and provide separate FOP databases for graphite electrodes and connecting pins. The Department gave Fushun Jinly numerous opportunities to provide the requested information. Fushun Jinly repeatedly: (1) failed to report that it sold by-products; (2) denied that it was able to report FOP data based on more of the Department’s CONNUM characteristics than just power level; and (3) indicated that it could not report the FOP data for graphite electrodes and connecting pins separately. It was not until after the Department’s preliminary determination, in an untimely submission and subsequent submissions explaining its initial untimely submission, that Fushun Jinly: (1) reported that it sold by-products during the POI; (2) submitted FOP data for graphite electrodes and connecting pins separately; and (3) provided documents indicating that it could have reported the FOP data based on more of the Department’s CONNUM characteristics than just power level, contrary to its repeated contention that it could not do so. The fact that Fushun Jinly was in possession of the above-referenced information, but failed to provide such information in a timely manner, evidences a failure to cooperate to the best of its ability.

In addition, in explaining its untimely submission, Fushun Jinly revealed for the first time that it would not be able to obtain documents to support the data obtained from its tollers who performed graphitization, data which comprise an important part of Fushun Jinly’s reported FOP data. Throughout this investigation, Fushun Jinly repeatedly attested to the accuracy and completeness of FOP data obtained from the tollers that performed graphitization, and repeatedly claimed that it used only two tollers for graphitization. The Department indicated in the questionnaire and repeatedly stated in supplemental questionnaires, that Fushun Jinly’s reported information is subject to the Department’s verification. Moreover, the Department had previously asked for production records from the tollers (although Fushun Jinly failed to respond

to the Department's request).<sup>13</sup> Thus, Fushun Jinly was aware of the need for the tollers' records and knew, or should have known, at an early stage of this proceeding, that it could not provide support for the FOP data for graphitization. Nevertheless, Fushun Jinly did not inform the Department of this fact until after its untimely submission, thereby, impeding the Department's ability to address the issue in a timely manner in this proceeding. Accordingly, given its knowledge that the FOP data for graphitization could not be supported, and its failure to inform the Department of this fact at an early stage of the proceeding, Fushun Jinly has failed to demonstrate that it acted to the best of its ability. Moreover, as indicated above, Fushun Jinly's untimely submission reflected substantial reductions to consumption quantities for major graphitization inputs, made by the same tollers whose data could not be supported. Further, company records used to explain the untimely submission call into question the number of tollers reportedly used in the graphitization process. These facts further demonstrate that Fushun Jinly failed to act to the best of its ability by not providing necessary information in a complete, accurate and timely manner. For the above-referenced reasons, the Department determines that Fushun Jinly failed to cooperate to the best of its ability.

In sum, despite the Department's request for specific information involving Fushun Jinly's FOP data, Fushun Jinly gave insufficient attention to its statutory duty to reply accurately and fully to requests for factual information in a timely manner regarding its FOP data. For all of the aforementioned reasons, the Department finds that Fushun Jinly failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act. We are not persuaded by Fushun Jinly's argument that it could not have submitted the information at issue in a timely manner because the first verification in this case began so quickly after the preliminary determination was issued. All of the untimely information that Fushun Jinly submitted existed prior to the preliminary determination, including the production and inventory records used to separate factor quantities for high power connecting pins from those of high power electrodes.<sup>14</sup> Moreover, all of the untimely information submitted by Fushun Jinly had been requested by the Department well in advance of the preliminary determination.<sup>15</sup> Thus, Fushun Jinly was aware of the need to provide this information, and was given the opportunity to submit the information in a timely manner, but failed to do so. There would have been no need for Fushun Jinly to provide the information at issue in "response" to the preliminary determination if Fushun Jinly had properly responded to the Department's earlier requests for such information. Additionally, Fushun Jinly's claim that it could not provide separate factor quantities for graphite electrodes and connecting pins because they would not reconcile to its financial statements is belied by the fact that it ultimately did provide separate quantities, even though it continued to maintain that they do not reconcile with its financial statements.<sup>16</sup> Therefore, the Department's decision in the preliminary determination to exclude connecting pins from the scope of the investigation, and the timing of verification did not prevent Fushun Jinly from submitting this information in a timely manner. Furthermore, the Department finds no merit in Fushun Jinly's argument that it is entitled to a separate rate because it was a fully cooperative respondent during this investigation. For the reasons noted above, we have determined that Fushun Jinly was not cooperative. Thus, consistent with section 776(b) of

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<sup>13</sup> See the June 19, 2008, supplemental questionnaire, Section D portion, "Reported Factors of Production" question 7.

<sup>14</sup> See page 50 of Fushun Jinly's November 3, 2008, case brief.

<sup>15</sup> See footnotes 9 through 12 above.

<sup>16</sup> See Fushun Jinly's November 3, 2008, case brief, pages 50-51.

the Act, because Fushun Jinly failed to cooperate to the best of its ability in this investigation, we determined that applying total AFA to this company is appropriate.

Accordingly, while Fushun Jinly remains a mandatory respondent in this investigation, for purposes of the final determination of this investigation, as AFA, the Department considered Fushun Jinly to be part of the PRC-wide entity, and not entitled to a separate rate. For further detail, see the Federal Register notice, issued concurrently with this Issues and Decision Memorandum. The Department has assigned the PRC-wide entity the highest rate in this proceeding, which is the highest rate calculated in the Petition filed in this investigation (*i.e.*, 159.64 percent). See id. See also the Antidumping Duty Petition for Small Diameter Graphite Electrodes from the People's Republic of China, dated January 17, 2008, (Petition), and Enclosure 4 of the addendum to the Antidumping Petition, dated January 30, 2008, (January 30, 2008, Addendum to Petition).

### **Comment 2: Whether Graphite Connecting Pins are Covered by the Scope of the Investigation**

Prior to the preliminary determination, in response to a request from the Department for comments on whether graphite pin joining systems (connecting pins) are within the scope of the investigation, the petitioners and respondents submitted scope comments. The petitioners argued that all connecting pins, regardless of whether they are attached to, shipped with, or sold separately from, electrodes, should be included in the scope. The respondents agreed that connecting pins are within the scope of the investigation when they are sold with electrodes (either attached to the electrode or unattached), but not when they are sold separately from the electrodes. In the preliminary determination, the Department preliminarily determined that all connecting pins are outside the scope of the investigation because the scope identified only small diameter graphite electrodes as the subject merchandise, and did not state that both electrodes and connecting pins are subject merchandise. See Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances, in Part, 73 FR 49408, 49409 (August 21, 2008) (Preliminary Determination). Since the preliminary determination, the petitioners submitted comments disputing the Department's finding that connecting pins are outside the scope of this investigation, and requested that the Department amend its preliminary scope determination by explicitly indicating in the scope description that connecting pins are covered by the scope. See petitioners' October 6, 2008, submission.

In support of their argument, the petitioners argued that the Department's preliminary finding that connecting pins are outside the scope of the investigation ignores several facts: (a) the Petition does not explicitly state that connecting pins are subject merchandise because connecting pins are a component of a complete graphite electrode; (b) the Petition rate is based on normal values and U.S. price quotes that reflect both an electrode and a connecting pin; (c) the initiation of this investigation was based on a dumping analysis that included pins; (d) all facets of the International Trade Commission's (ITC) investigation incorporated data on connecting pins; (e) the model match comments, the multiple comments clarifying the scope, and the revised scope language submitted by petitioners made clear petitioners' intent to include

connecting pins in the scope; and (f) the Respondents in this investigation also agree that connecting pins should be covered by the scope if they are sold with the electrodes (either attached or unattached). The petitioners further contend that the Department has the legal authority to clarify the scope language during the course of an investigation, particularly when interested parties submit comments prior to a preliminary determination. Moreover, the petitioners argue that, in this case, even if the Department believes that the scope language does not explicitly state that connecting pins are included, it should have considered the Petition in its entirety, and the clarifying statements made by the interested parties prior and subsequent to the preliminary determination indicating that connecting pins are within the scope of the investigation. Finally, the petitioners argue that the Department's erroneous preliminary scope determination may result in Customs fraud, as foreign producers may sell electrodes and connecting pins separately and misprice each item to avoid duties (i.e., producers may sell electrodes at artificially high prices and sell connecting pins at artificially low prices to circumvent dumping), and the importers may try to limit their dumping deposits by attributing artificially high values to connecting pins.

The respondents reiterated their pre-preliminary comments that the scope should include connecting pins that are sold in the same transaction with an electrode (either attached to the electrode or unattached); but not when they are sold separately from the electrode. See Fushun Jinly's November 10, 2008, submission.

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

The courts have repeatedly held that the Department "has inherent authority to define the scope of an antidumping duty investigation." See NTN Bearing Corp. of America v. United States, 747 F. Supp. 726 (Ct. Int'l Trade 1990) (NTN Bearing (1990)); Koyo Seiko Co., Ltd. v. United States 834 F.Supp. 1401 (Ct. Int'l Trade 1993) (Koyo (1993)). The Department "generally exercises this broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." See Kerns-Liebers USA Inc. v. United States, 881 F. Supp. 618 (Ct. Int'l Trade 1995) (quoting Minebea Co. v. United States, 782 F. Supp. 117 (Ct. Int'l Trade 1992), *aff'd* on other grounds, 984 F.2d 1178 (Fed. Cir. 1993)). Moreover, the Department's discretion permits interpreting the petition in such a way as to best effectuate not only the intent of the petition, but the overall purpose of the antidumping law. As stated by the Court of International Trade in NTN Bearing (1990), if the Department "determine{s} the petition to be overly broad, or insufficiently specific to allow proper investigation, or in any other way defective, it possess{e}s the inherent authority to redefine and clarify the parameters of its investigation." See NTN Bearing (1990), 774 F. Supp. at 731.

In this case, the Department preliminarily found all connecting pins to be outside the scope of the investigation because the scope appeared to identify only small diameter electrodes as subject merchandise and the Petition described subject merchandise as small diameter graphite electrodes. However, upon further review of the record of this investigation, and based upon the parties' comments regarding this issue, we have determined that while the scope in the Petition does not specifically mention connecting pins, there are indications in the Petition that the petitioners intended the scope to cover connecting pins.

Specifically, the petitioners stated in the Petition that “[s]mall diameter graphite electrodes consist of two main parts: (1) the graphite electrodes; and (2) the graphite pin, which typically connects to the graphite electrode depending on the type of joining system.” See page 55 of the Petition. The Petition further described the stages of production of both the graphite electrodes and connecting pins. *Id.* In addition, the margins calculated in the January 30, 2008, Addendum to Petition are based on U.S. prices and normal values for both graphite electrodes and connecting pins. See Enclosures 3 and 4 of the January 30, 2008, Addendum to Petition. Furthermore, as noted above, the petitioners have argued that they intended that the scope cover connecting pins and have asked the Department to modify the scope language to explicitly include all connecting pins. Additionally, we find that petitioners’ intent to include pins is further clarified by other record evidence showing that: (1) connecting pins can be used only in conjunction with graphite electrodes; (2) connecting pins are designed specifically to fit certain sizes of graphite electrodes; and (3) connecting pins are produced by the same manufacturers that produce graphite electrodes, and undergo virtually an identical production process as graphite electrodes, except at the machining stage where connecting pins are cut and threaded to fit graphite electrodes of matching sizes. We also note that respondents reported sales and factor data for connecting pins sold with electrodes and have argued that connecting pins sold with electrodes are covered by the scope of this investigation. Finally, we note that connecting pins hold a group of electrodes in a column and perform the same function as the electrodes. Thus, connecting pins can be viewed simply as an integral component of the electrode.

For the above-referenced reasons, the Department finds that petitioners intended to include connecting pins in the scope, and that connecting pins are integral to graphite electrodes, as evidenced by the information provided not only in the Petition, but in other record evidence in this investigation, as well. Accordingly, we have determined that all connecting pins for small graphite electrodes, whether or not they are attached to, sold with, or sold separately from the graphite electrodes are covered by the scope of this proceeding, as described in the “Scope of Investigation” section of the Federal Register notice accompanying this Issues and Decision memorandum.

### **Comment 3: Whether the Fangda Group’s Dumping Margin Should be Based on Adverse Facts Available**

Petitioners contend that the extent and the nature of the Fangda Group’s failures at verification warrant the application of total AFA. In support of their argument, the petitioners claim that the Fangda Group: (1) withheld FOP data for the affiliated producer, Hefei Carbon; (2) failed to disclose its reliance on a number of tollers used to produce graphite electrodes; (3) failed to report CONNUM-specific FOP data; and, (4) incorrectly reported all energy inputs and misreported U.S. sales.

As discussed in detail below, the Fangda Group argues that it acted to the best of its ability and that the application of AFA is not warranted.

Each issue raised by interested parties is discussed below.

**A. Hefei Carbon's Unreported FOP Data for Production of Merchandise Under Consideration**

Petitioners argue that the Department notified the Fangda Group that it was required to report Hefei Carbon Co., Ltd.'s (Hefei Carbon's) FOP data in its initial Section D response and in a supplemental questionnaire, but that the Fangda Group's responses misled the Department regarding production of in-scope merchandise by Hefei Carbon, one producer in the group. According to petitioners, despite the Fangda Group's statements to the contrary, it was not until verification that the Fangda Group first informed the Department that Hefei Carbon produced models of merchandise under consideration identical to those sold to U.S. customers by the Fangda Group.

Petitioners contend that the Fangda Group did not fully disclose Hefei Carbon's role in the production of merchandise under consideration. Moreover, petitioners argue, once the Fangda Group identified Hefei Carbon as a producer of in-scope merchandise, the Fangda Group failed to disclose that Hefei Carbon produced merchandise under consideration identical to the merchandise sold to U.S. customers by other Fangda Group companies, a fact that would have required the Fangda Group to report FOP data for Hefei Carbon. Petitioners further state that the Fangda Group clearly and repeatedly contended that Hefei Carbon did not produce CONNUM-specific subject merchandise and, thus, according to the Fangda Group, Hefei Carbon was not required to report FOP data to the Department. Petitioners argue that there can be no stronger evidence of a party's failure to cooperate than a respondent knowingly submitting unreliable and inaccurate information. In addition, petitioners claim that record evidence indicates that Hefei Carbon is a significant producer and, therefore, the impact of the Fangda Group's withholding of Hefei Carbon's FOP information is significant. Accordingly, petitioners assert, the Department cannot rely on the Fangda Group's submitted FOP data.

The Fangda Group contends that it specifically pointed out that it reported in its response that although Hefei Carbon "produced several types of the graphite electrodes that are merchandise under consideration," those "types were not sold to the United States." See the Fangda Group's July 8, 2008, submission to the Department. The Fangda Group also argues that it was unable to report Hefei Carbon's FOP data because the Department's CONNUM reporting requirements reflected the combined physical characteristics of two distinct components: electrodes and connecting pins. Accordingly, the Fangda Group argues, to report FOP data for Hefei Carbon, the Fangda Group had to link electrodes to the connecting pins that they were sold with. The Fangda Group contends that no such linkage could be accomplished here without reference to company-specific U.S. sales records (and Hefei Carbon made no U.S. sales during the POI) because graphite electrodes and the connecting pins sold with them are not commodity products. Rather, the Fangda Group contends that graphite electrodes and connecting pins are unique, made-to-order products. The Fangda Group notes that the ITC stated, in a footnote, that graphite electrodes are not a commodity product. The Fangda Group cites to supplemental questionnaire responses in which it explained this assertion to the Department, and asked the Department for guidance in reporting its FOP.

According to the Fangda Group, the Department should consider the impact its decision to exclude connecting pins from the scope of the investigation has had on the ability of the Fangda

Group to report CONNUM-specific FOP data for Hefei Carbon. The Fangda Group states that the Department could have requested Hefei Carbon's FOP after it made its decision to exclude connecting pins from the scope—a request the Fangda Group was waiting to comply with—however, such a request was not made. Furthermore, the Fangda Group argues that the Department gave the Fangda Group no time to respond to its decision to exclude connecting pins from the scope of the investigation; the deadline for submission of any data changes passed the day before the Department issued its preliminary disclosure documents.

The petitioners raise several arguments in rebuttal. First, petitioners argue that the Fangda Group's case brief demonstrates that the respondents were aware that they were required to report affiliated producers' FOP data for merchandise under consideration in their questionnaire responses even if the goods were not destined for the United States. Second, petitioners contend the Fangda Group explicitly stated that Hefei Carbon did not produce the same models sold to the United States by the Fangda Group. Third, petitioners refute the Fangda Group's claim that the Department's preliminary decision to exclude connecting pins from the scope of the investigation triggered the need for Hefei Carbon's FOP data for the first time in this proceeding. Fourth, petitioners disagree with the Fangda Group's contention that electrodes and the connecting pins sold with them are so unique that they cannot be equated with other electrodes and pins.

In rebuttal, the Fangda Group argues that it did not state at verification that Hefei Carbon produced the same models of graphite electrodes that were sold to the United States; rather the Fangda Group stated that it produced the same types of graphite electrodes. This distinction is important, the Fangda Group argues, because graphite electrodes, and the connecting pins that are sold with them, are unique, non-commodity products, and, thus, any inference that Hefei Carbon produced the same models that were sold to the United States is unwarranted. In support of its argument, the Fangda Group argues that the ITC and the petitioners have both stated that graphite electrodes are not a commodity product.

The Fangda Group further argues that the Department failed to acknowledge the impact of its preliminary determination that connecting pins are not included in the scope of the investigation. The Fangda Group notes that all questionnaire responses were submitted before the scope decision was made and that the Department did not request Hefei Carbon production data after the decision was made. Additionally, the Fangda Group contends that Department verifiers refused to discuss the impact of the Department's preliminary scope determination on the CONNUM reporting methodology. According to the Fangda Group, the lack of attention given to the CONNUM reporting methodology is evidenced by the Department's verification report, which contains little discussion of the issue, other than misquoting company officials as stating that CONNUM is a "loaded" term.

Moreover, the Fangda Group states that when the Department's CONNUM reporting requirements included both electrode and connecting pin data, it clearly informed the Department of its need to link FOP data for connecting pins and electrodes and asked the Department for instruction on a reporting methodology.

In light of these considerations, the Fangda Group contends that any claim that it knowingly submitted inaccurate and false information concerning Hefei Carbon is without merit.

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

The record of this investigation prior to and during the Department's verification establishes that the Fangda Group: (1) made inaccurate statements about Hefei Carbon's production; and (2) failed to report FOP for Hefei Carbon despite being instructed to do so by the Department. As a result, the FOP data submitted by the Fangda Group lacks information for Hefei Carbon, one of the producers in the Fangda Group.

The Fangda Group first reported inaccurate information in response to the Department's section D questionnaire, which contained the following instructions:

If you produce the *merchandise under consideration* at more than one facility, you must report the factor use at each location. You must also report the output of the merchandise under consideration at each of the various facilities during the POI.

(Emphasis added). Section A of the Department's questionnaire states, "{b}y merchandise under consideration we mean merchandise under consideration described in Appendix III of the questionnaire {i.e., the scope description}, regardless of market destination. See The Fangda Group's May 5, 2008, Section A Response at A-1. In response to these instructions, the Fangda Group reported that the merchandise under consideration was produced by three affiliated companies: Fangda Carbon, Fushun Carbon, and Chengdu Rongguang.<sup>17</sup> See the Fangda Group's June 2, 2008, Section D Response, at D-3. The Fangda Group failed to report Hefei Carbon's production of merchandise under consideration even though the Fangda Group later acknowledged that Hefei Carbon was a producer of the merchandise under consideration. See, e.g., the Fangda Group's June 26, 2008, 4<sup>th</sup> Supplemental Response (Sections A-D), Questions 1-13, at 3.

Subsequent to the Fangda Group's identification of Hefei Carbon as a producer of merchandise under consideration, the Department requested that the Fangda Group report FOP data for Hefei Carbon if "Hefei Carbon manufactured any merchandise during the POI that would be classified under CONNUMs reported in the U.S. sales database." See the Fangda Group's July 8, 2008, supplemental questionnaire response at 6. In response to this request, the Fangda Group stated that "Hefei Carbon did not manufacture any merchandise that would be classified under CONNUMs reported in the U.S. sale database and thus did not report its FOPs to the Department." See id. The Fangda Group had previously explained that producers manufactured and recorded the production of electrodes and connecting pins separately but the CONNUM characteristics reflect the physical characteristic of both electrodes and connecting pins. Thus, the Fangda Group explained that it need to use the quantities of electrodes and connecting pins sold in each U.S. transaction to combine the separate FOP for electrodes and connecting pins into one set of factor quantities for each reported CONNUM. See, e.g., the Fangda Group's June

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<sup>17</sup> The Fangda Group also identified two outside processors used by Chengdu Rongguang. See the Fangda Group's June 2, 2008, Section D Response, at D-3.

26, 2008, 4<sup>th</sup> Supplemental Response (Sections A-D), Questions 1-13 at 2-3 and July 8, 2008 4<sup>th</sup> Supplemental Response (Sections A-D), Questions 14-44 at 6, 8, and 9. The Fangda Group stated that “since {Hefei Carbon} did not sell any subject merchandise to the United States during the POI, Hefei {Carbon} did not establish FOP with respect to the Department’s CONNUMs.” See the Fangda Group’s June 26, 2008, 4<sup>th</sup> Supplemental Response (Sections A-D), Questions 1-13 at 3.

Subsequently, the Department requested that the Fangda Group report, for each producer, FOP data for electrodes using CONNUM characteristics that could be determined based on the physical characteristics of electrodes and separate FOP data for connecting pins using CONNUM characteristics that reflected the physical characteristics of connecting pins. The Fangda Group tracked connecting pin and electrode production separately, and, as discussed in more detail below, only needed knowledge of the physical characteristics of each of these components to report the separate FOP requested by the Department. See the Fangda Group’s June 26, 2008, Supplemental Section D Response (Part I), at 8 and Memorandum to the File through Howard Smith, Program Manager, Office 4, AD/CVD Operations, re: “Verification of the Questionnaire Responses of Beijing Fangda New Material Co., Ltd.,” dated October 27, 2008, at Exhibit 7 (Beijing Fangda Verification Report). Moreover, at the verification of Beijing Fangda, the last company to be verified during the Department’s near month-long verification, the Department discovered that during the POI, Hefei Carbon did, in fact, produce some of the same models of graphite electrodes that were sold to the United States during the POI by other Fangda Group companies. See Beijing Fangda Verification Report at 7. Thus, the Fangda Group should have reported FOP data for all graphite electrodes produced by Hefei Carbon during the POI that would have been classified under the same CONNUMs reported by the other Fangda Group companies. However, the Fangda Group did not report Hefei Carbon’s FOP data in response to the Department’s request for separate FOP data for electrodes and connecting pins. See the Fangda Group’s August 1, 2008, 5<sup>th</sup> Supplemental Response, at 2-4 and Appendices S5-3 through S5-4. Further, although the Fangda Group indicated that it could not report CONNUM-specific FOP data for Hefei Carbon because it needed U.S. sales by Hefei Carbon to link electrodes with connecting pins, there was no need to link electrodes with connecting pins in order to report segregated FOP data for connecting pins and electrodes. Therefore, Hefei Carbon should have reported the segregated FOP data for connecting pins and electrodes that was requested by the Department.

We also disagree with the Fangda Group’s claim that the Department’s Preliminary Determination that connecting pins were excluded from the scope of the investigation impacted the Fangda Group’s ability to report Hefei Carbon’s FOP data. To report the required FOP data for Hefei Carbon, the Fangda Group was required to compare Hefei Carbon’s production to the U.S. sales data submitted by the Fangda Group in this investigation and not, as the Fangda Group asserts, to sales made by Hefei Carbon. There is no indication that the Fangda Group made the required comparison of Hefei Carbon production to the Fangda Group’s U.S. sales data. Further, the Fangda Group could have reported FOP data for Hefei Carbon in response to the Department’s initial CONNUM reporting requirements because the physical characteristics reflected by the initial CONNUM required knowledge of the physical characteristics of the electrode alone. See the Fangda Group’s May 27, 2008, Section C Response at C-11. Moreover, any alleged difficulties in making the required comparison between Hefei Carbon’s production

and the Fangda Group's sales data were removed when the Department requested separate FOP data for pins and electrodes. See the Fangda Group's July 8, 2008, supplemental response at 8; see also the Fangda Group's August 1, 2008, 5<sup>th</sup> Supplemental Response at 2-3. The Department requested that the Fangda Group report separate FOP data for electrodes using CONNUM characteristics 3.1 through 3.5. See the Fangda Group's August 1, 2008, Questionnaire Response at 2. Each of these characteristics could have been determined by examining the physical characteristic of the electrode alone.

Furthermore, we find that the record of this investigation demonstrates the inaccuracy of the Fangda Group's assertion, that each graphite electrode and connecting pin combination is so unique that it is not possible to match Hefei Carbon's production data to the Fangda Group's U.S. sales in the absence of U.S. sales made by Hefei Carbon. The Department's CONNUM-specific reporting criteria required respondents to report physical characteristics that fall within ranges of diameters and lengths, rather than assigning a single CONNUM to each unique product. See, e.g., the Fangda Group's May 27, 2008, Section C response at C-9 – C-11. While, as discussed in detail below, the Fangda Group did not report CONNUM-specific FOP data in accordance with the Department's instructions, the Fangda Group did report consolidated, weighted-average FOP data that reflected overlapping production information for more than one producer. See, e.g., the Fangda Group's June 2, 2008, Section D response at D-3-1 – D-3-4. Thus, it is clear that the CONNUM reporting characteristics were broad enough that the Fangda Group could report production from more than one factory under a single CONNUM. Moreover, at verification, the Department found that Hefei Carbon maintained sales and production records that would have allowed the Fangda Group to match Hefei Carbon's production to subject electrodes sold to the United States by the other Fangda Group companies. See Beijing Fangda Verification Report, at 7-8. Accordingly, we find that the information available to Hefei Carbon should have enabled the Fangda Group to report the FOP data for Hefei Carbon as requested by the Department.

## **B. Unreported FOP Data for Tollers**

The Fangda Group reported FOP data for two tollers used by Chengdu Rongguang to perform two production processes for in-scope merchandise. See the Fangda Group's June 26, 2008, Supplemental Section D Response (Part I), at S3-3 - S3-4. At verification, however, the Department found that the Fangda Group used 13 tollers, in addition to the two tollers the Fangda Group chose to report, to produce merchandise under consideration. See Memorandum to the File through Howard Smith, Program Manager, Office 4, AD/CVD Operations, concerning, "Verification of the Questionnaire Responses of Chengdu Rongguang Carbon Co., Ltd.," dated October 27, 2008, at 11-15 (Chengdu Rongguang Verification Report).

Petitioners argue that the Fangda Group's failure to disclose these additional tollers and to report FOP data for these tollers renders the CONNUM-specific FOP data for the producers that used these tollers' data inaccurate and unreliable. According to the petitioners, the withheld information cannot be obtained, and its absence corrupts the Fangda Group's consolidated FOP dataset. Therefore, the petitioners assert, the Department should find that the Fangda Group has not cooperated to the best of its ability and should reject its FOP data in toto.

The Fangda Group argues that it appropriately reported FOP for the outside processor responsible for processing the actual subject merchandise sold to the United States. The Fangda Group notes that the Department found no discrepancy with company officials' statements at verification that the unidentified processors did not process the graphite electrodes that were sold to the United States. The Fangda Group further argues that the unidentified tollers at issue are not affiliated with the Fangda Group, and therefore, have no incentive to provide FOP data to the Department.

According to the Fangda Group, the Department has never held that a respondent must report FOP for unaffiliated processors that do not produce merchandise destined for the United States.<sup>18</sup> In fact, the Fangda Group asserts, the Department's policy has always been that a respondent is not required to report such factors of production. The Fangda Group argues that the instant situation is analogous to a situation where unaffiliated manufacturers who supply a trading company with the merchandise under consideration, but do not supply it with the actual subject merchandise shipped to the United States, are not required to provide their FOP data. The Fangda Group states that the Department does not require a respondent trading company to report the FOP of unaffiliated producers that did not produce subject merchandise sold to the United States because: (1) the Department requires FOP for subject merchandise (*i.e.*, merchandise sold in the United States), (2) the potential for manipulation is not present where parties are not affiliated, and (3) the reporting of all FOP regardless of the market in which the product is sold is unduly burdensome. According to the Fangda Group, the Department should apply the same rationale to find that respondents should not be required to report FOP data for unaffiliated tollers that did not process any merchandise sold to the United States.

The Fangda Group further argues that requiring the reporting of timely FOP of 15 tollers is unreasonable. The Fangda Group contends that such a reporting requirement is particularly burdensome because the Fangda Group was responsible for preparing a consolidated response from four companies, and the Fangda Group did not supply inputs to the unaffiliated tollers at issue, and, thus, had no knowledge of their consumption information.

In rebuttal, the petitioners argue that the Fangda Group was clearly instructed to report FOP data for its undisclosed tollers. Petitioners take exception with the Fangda Group's argument that unaffiliated tollers are analogous to unaffiliated trading companies and, as such, respondents need not report FOP for unaffiliated tollers that do not process the actual merchandise sold to the United States. According to petitioners, the Fangda Group's analogy is not relevant because the trading companies are required to report U.S. sales for the price side of the dumping equation while the tollers' data are required for the normal value (NV) side of the equation, and, therefore, reporting requirements are necessarily different. Petitioners argue that a producer is deemed to be in control of all stages of production, including those stages performed by tollers, and, thus, the tollers' data must be reported to avoid potential manipulation of NV.

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<sup>18</sup> See Respondent's November 19, 2008, rebuttal brief (redacted) at 30, citing Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Time Limits for the Preliminary Results of the New Shipper Reviews, 73 FR 15725 (March 25, 2008), and accompanying Issues and Decision Memorandum at Comment 8D. The Department notes that the Fangda Group's cited authority is not a determination; rather it is an extension of a deadline without an accompanying Issues and Decision Memorandum.

In rebuttal, the Fangda Group argues that it properly reported the FOP data for the one unaffiliated toller that processed merchandise under consideration.<sup>19</sup> The Fangda Group argues, there is no statutory or regulatory requirement, nor any Department precedent, that requires a respondent to report a processor's or toller's factors of production when that processor or toller does not process the actual merchandise that is exported to the United States.

The Fangda Group argues that it is neither affiliated with, nor in control of, its tollers as evidenced by the fact that the Department traced the reported FOP data to the financial statement of the toller, rather than a Fangda Group company financial statement. The Fangda Group notes that in EMD,<sup>20</sup> the Department determined not to use the FOP data from an unaffiliated supplier, reasoning, inter alia, there was no potential for manipulation. Additionally, the Fangda Group argues that the Department has not required a respondent to report FOP data for tollers with which it is neither affiliated nor highly integrated. Therefore, the Fangda Group contends, there is no basis for requiring FOP data for its uncontrolled, unaffiliated tollers. The Fangda Group further argues that these unaffiliated tollers do not even meet the statutory definition of interested parties.

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

The record shows that the Fangda Group failed to identify all of the tollers used to process merchandise under consideration during the POI despite a specific request by the Department to do so. In its case and rebuttal briefs, the Fangda Group advances several arguments to support its claim that it should not have been required to report FOP data for these undisclosed tollers.

In examining the Fangda Group's submissions and questionnaire responses, however, it would appear that the only reasonable interpretation of the response is that the FOP data for two tollers' production reported by the Fangda Group reflected the production of all tollers used to process merchandise under consideration. However, the submitted information is incomplete because it does not capture FOP data for the additional 13 tollers discovered during verification that performed graphitization, rebaking, and baking. By failing to disclose these additional tollers, and failing to report FOP data for them, we find that the Fangda Group withheld information and impeded the Department's investigation, as discussed below.

First, the Department's instructions required the Fangda Group to report FOP reflecting "the factors of production used to produce one unit of the merchandise under consideration." See the Fangda Group's June 2, 2008, Section D Response at D-1. The Department never instructed the Fangda Group to limit its reporting of FOP to a certain subset of tollers. See, generally, the Fangda Group's June 2, 2008, Section D Response. Furthermore, the Department's

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<sup>19</sup> The Fangda Group reported FOP data for two tollers, however, only one of the tollers processed semi-finished graphite electrodes. See the Fangda Group's June 26, 2008, Supplemental Section D Response (Part I) at Appendix S-3 – S-4.

<sup>20</sup> See Electrolytic Manganese Dioxide From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 48195 (August 18, 2008) (EMD), and accompanying Issues and Decision Memorandum at Comment 1.

questionnaire made it clear that if the Fangda Group had any questions regarding how to calculate its FOP it should contact the Department. See id. at D-2.

Second, in a supplemental questionnaire, the Department instructed the Fangda Group to “provide an additional dataset that includes the FOP data for all material and energy inputs that went into the partial production of merchandise under consideration while the merchandise was being outsourced.” See the Fangda Group’s June 26, 2008, Supplemental Section D Response (Part I), at 3. In response to this request, the Fangda Group reported FOP data for two tollers used by Chengdu Rongguang. See id., at Appendices S3-3 and S3-4.

Third, in a subsequent supplemental questionnaire, the Department requested further FOP information for the tollers used by one producer in the Fangda Group, Chengdu Rongguang, which is the only factory the Fangda Group identified as using tollers. Specifically, the Department gave the Fangda Group the following instructions:

For each toller that provided outside services to Chengdu Rongguang during the POI, please provide separate factors of production databases that report per-unit consumption quantities using the CONNUMs for electrodes and pins identified in item 1 of this supplemental questionnaire....

See the Fangda Group’s August 1, 2008, 5<sup>th</sup> Supplemental Response at 7-8. In response to the Department’s supplemental request for FOP information, the Fangda Group again provided FOP data for only two tollers used by Chengdu Rongguang to produce merchandise under consideration. See id.

Accordingly, the record of this proceeding developed prior to verification indicates that the Fangda Group consistently reported that only one of its factories, Chengdu Rongguang, used only two tollers to produce merchandise under consideration during the POI. Nowhere in its responses did the Fangda Group disclose to the Department that it was limiting its reporting of FOP data to certain tollers. It was not until the Department’s verification of the Fangda Group companies, that the Department discovered that Chengdu Rongguang used 12 tollers to perform a total of three services, graphitization, baking, and rebaking, and Fushun Carbon, another producer in the Fangda Group, used three tollers to graphitize merchandise under consideration. See Chengdu Rongguang Verification Report, at 11-15. Further, the Department discovered at verification that all of the undisclosed tollers used by Chengdu Rongguang and Fushun Carbon processed the same models of graphite electrodes that the Fangda Group sold in the United States during the POI. See id.

With respect to the Fangda Group’s assertion that it was not required to report FOP for these undisclosed tollers because the Fangda Group is neither affiliated with, nor in control of, these companies, we note that the Fangda Group’s failure to disclose the identity of its tollers deprived the Department of the opportunity to examine the relationship between the Fangda Group and these companies. Accordingly, the record of this investigation lacks the information needed for the Department to determine whether the Fangda Group is affiliated with, or in control of, the tollers at issue. Absent any facts on the relationships, the Department cannot, for example,

conclude that the Fangda Group and the 13 tollers at issue are not affiliated under section 771(33)(G) of the Act, which requires the Department to consider whether one person is legally or operationally in a position to exercise restraint or control over another person. Accordingly, because the Fangda Group failed to report that it relied on 13 additional tollers to produce the merchandise at issue, we were unable to verify that the Fangda Group is neither affiliated with, nor in control of, these unreported tollers.

Moreover, even if the Fangda Group were not affiliated with, or in control of, these undisclosed tollers, the Fangda Group would not have been relieved of its obligation to disclose its reliance on these tollers to produce merchandise under consideration. By withholding information from the Department, the Fangda Group prevented the Department from determining an accurate normal value, including the value for such manufacturing processes.

Moreover, the Fangda Group's analogy involving a trading company and its unaffiliated supplier that did not supply the merchandise shipped to the United States does not support its position regarding the unreported tollers. As noted above, the Department's Section D Questionnaire requires respondents to report FOP used to produce one unit of the merchandise under consideration for all models in the U.S. database, including that portion of the production not destined for the United States. See the Fangda Group's June 2, 2008, Section D Response at D-1. In this case, the Fangda Group used tollers to perform some of the production processes. Since the Fangda Group did not perform all of the production processes itself, but instead used tollers, the Fangda Group should have reported FOP data for all tollers to fully respond to the questionnaire. As petitioners correctly state, the rationale for valuing processing provided by tollers is to develop an accurate NV that reflects the FOP for all production of the CONNUMs sold to the United States regardless of the market in which some of the merchandise was sold.

Additionally, we find that the Fangda Group's reliance on EMD is misplaced. The issue before the Department in EMD was whether to collapse a respondent and its supplier of inputs. See EMD, 73 FR 48195 and accompanying Issues and Decision Memorandum at Comment 1. In the instant case, the issue involves valuing the manufacturing processes provided by tollers that processed semi-finished goods. Unlike EMD, in which the Department used a surrogate value to value the input at issue, there is no available surrogate value for the processing provided by the tollers used by the Fangda Group. In the absence of a surrogate value for these processing services, the Department must rely on the FOP data that reflects the production experience of the Fangda Group's tollers. Because the FOP data provided by the Fangda Group are incomplete, the Department cannot rely on these data.

Further, we disagree with the Fangda Group's argument that its decision not to identify the tollers at issue was appropriate because reporting FOP data for numerous additional tollers that are neither affiliated with, nor controlled by, the Fangda Group imposes an undue burden. The Fangda Group reported FOP data for selected tollers without informing the Department that it used many more tollers to process merchandise under consideration. There is no indication that the Fangda Group's failure to disclose these tollers was the result of an inadvertent error. Thus, the Fangda Group essentially made a unilateral decision to report a self-selected sample of FOP data for its tollers, rather than informing the Department of its use of a large number of tollers created difficulties in reporting the requested FOP data as required, and specifically indicated in

the Department's questionnaire. See the Fangda Group's June 2, 2008, Section D Response at D-3 - D-4; see also the Fangda Group's June 26, 2008, Supplemental Section D Response (Part I), at S3-3 - S3-4. As the Department explained in Wooden Bedroom Furniture,<sup>21</sup> in the absence of notification to the Department by a respondent concerning difficulty with its reporting, an argument that the Department should excuse a respondent's failure to disclose the use of tollers or subcontractors is without merit. Had the Fangda Group fully disclosed its use of numerous tollers and, if it had difficulty in reporting the required information, explained the difficulty, the Department could have worked with the Fangda Group to resolve these problems, including exploring the possibility of alternative reporting methodologies. See id.

Lastly we note that the production processes performed by the unreported tollers for the Fangda Group companies are significant. For example, one of these tolled production processes, graphitization, is the process which converts non-subject merchandise to subject merchandise. Further, the record demonstrates that the tolled production processes reported by the Fangda Group consume a significant amount of energy and labor. See the Fangda Group's June 26, 2008, Supplemental Section D Response (Part I), at S3-3 - S3-4. Accordingly, we find the record lacks information regarding significant stages of production needed to calculate an accurate NV.

### **C. Failure to Report CONNUM-specific FOP Data**

The Department's CONNUM characteristics included, inter alia, power level, length, and diameter. See, e.g., the Fangda Group's May 27, 2008, Section C questionnaire response at C-9 - C-11. Prior to verification, the Fangda Group reported that it was able to report its FOP data on the basis of power level and diameter, but that it was not able to report on the basis of length. However, at verification, the Department found that the Fangda Group companies had not properly allocated their reported FOP on the basis of diameter. See the Department's position, below, for a discussion of the Department's verification findings. At verification, the Department also found that each of the Fangda Group's verified producers maintained production records that indicated consumption quantities for certain stages of production on the basis of power level, diameter, and length. Petitioners argue that this verification finding evidences the Fangda Group's ability to report FOP data on the basis of these physical characteristics.

Petitioners state that the Fangda Group misled the Department when it certified that its submitted FOP data was based on both power level and diameter, and, thus, would have excluded data for large diameter non-subject merchandise. Petitioners further contend the Fangda Group never informed the Department that Fangda Carbon's FOP data included data for non-subject merchandise, and that this failure to exclude non-subject merchandise most likely results in an understated FOP. Petitioners argue that the verification report provides evidence that Fangda Carbon could have relied on its normal books and records to allocate its reported FOP on the basis of diameter, and consequently, could have excluded the inputs used to produce non-subject,

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<sup>21</sup> See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review, 73 FR 49162 (August 20, 2008) (Wooden Bedroom Furniture) and accompanying Issues and Decision Memorandum at Comment 26.

large diameter merchandise from its reported FOP data. Moreover, petitioners argue that the Department's verification findings indicate that the differences in consumption quantities between subject and non-subject merchandise are significant.

Further, petitioners argue that the Fangda Group's reporting failure affects all components of NV, *i.e.*, direct materials, labor, energy, and imputed expenses for factory overhead, selling, general and administrative (SG&A) expenses, and profit. Accordingly, petitioners argue, the consolidated FOP data reported by the Fangda Group are unreliable and unusable.

The Fangda Group maintains that the verification exhibits support their statements that the Fangda Group could not have reported FOP data for each company on the basis of length and diameter. According to the Fangda Group, the verification exhibits conflict with statements in the verification report that indicate that the Fangda Group companies maintained records that enable them to allocate costs on the basis of diameter and length. *See, e.g.*, Chengdu Rongguang Verification Report, at Exhibit 2-C. Specifically, the Fangda Group argues that company records taken at verification show the production records identified in the verification reports do not record actual consumption, but instead provide guidelines for production. Additionally, the Fangda Group asserts that the records demonstrate that the different producers treat variances differently, and, thus, the only consistent criteria or the common divisor in the three factories is power level. The Fangda Group also argues that the companies' production records do not record length and diameter during significant stages of production and the accounting records do not reflect these physical characteristics, therefore, according to the Fangda Group, only the power level criterion provides a consistent, verifiable allocation methodology.

Furthermore, the Fangda Group argues that the verification exhibits show that any difference between the allocation methodology it used and the one discussed by the Department verifiers is minimal. The Fangda Group further claims that the allocation methodology discussed at verification would not exclude FOP data for merchandise that falls outside of the scope of this investigation.

In rebuttal, petitioners argue that the Fangda Group's arguments regarding its company-specific production records do not support the Fangda Group's contention that its reporting methodology was acceptable. Specifically, petitioners disagree with the Fangda Group's argument that it properly reported its FOP using power level, the only physical characteristic that was consistently tracked by all three factories. In support of their argument, petitioners claim that the Fangda Group's factories maintained records that permitted the reporting of factory-specific FOP data, which could have been weight-averaged to create a consolidated FOP data set.

Additionally, petitioners argue that the evidence on the record contradicts the Fangda Group's assertion that its production records do not reflect unique products, *i.e.*, that a single recipe may be used for more than one size of electrode. Petitioners argue that the records relied on by the Fangda Group to make the claim that its recipes are not unique cannot be relied upon.<sup>22</sup> Moreover, petitioners argue that even if some of the recipes may be used to produce more than

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<sup>22</sup> Petitioners argue that a discrepancy exists in the production recipes cited by the Fangda Group; however, the details of this irregularity are proprietary in nature. *See* the petitioners' November 10, 2008, Rebuttal Brief, at 20.

size of electrode, this does not mean that the recipes should not have been used to report CONNUM-specific FOP data.

Petitioners further argue that the Fangda Group's claim, that its methodology was derived from the only records that would tie to financial statements, lacks merit because the Department found that the Fangda Group's production records at issue could be tied to its accounting records. Additionally, petitioners claim that any assertion that the Fangda Group did not retain all records needed to report CONNUM-specific FOP data is contradicted by the Department's verification findings. See Chengdu Rongguang Verification Report at C-2.

In rebuttal, the Fangda Group contends that petitioners' argument is without merit because their entire argument is premised upon the reference to product diameter/length in product "recipes" used in the forming stage and does not take into consideration later stages of production where products of various diameters and length are processed together.

According to the Fangda Group, the Department's verifiers believed that Fangda Group's production records that listed product diameter and lengths allowed for allocation of consumption quantities for graphite electrodes based on length and diameter for each product. Thus, the Fangda Group argues, the Department verifiers believed that in order to reconcile the FOP, the FOP for each product from each of the three Fangda factories must be consistently reported for each specific graphite electrode product with a specific length and diameter. However, the Fangda Group contends that product lengths and diameters are not consistently reported for each of the three factories and more importantly are not consistently reported at each stage of production. The Fangda Group argues that if it had used the recipes to report the factors of production, in fact the factories could not have passed verification because the recipes do not provide actual costs.

Regarding petitioners' argument that Fangda Carbon failed to exclude non-subject merchandise from its FOP data, the Fangda Group asserts that Fangda Carbon's records do not permit the reporting of FOP on the basis of diameter. Thus, the Fangda Group's reporting methodology was reasonable.

The Fangda Group argues that it used the most reliable and verifiable methodology to allocate its costs based on records maintained in the normal course of business. Specifically, the Fangda Group states that it allocated raw material inputs based on the power level of electrodes and connecting pins. According to the Fangda Group, although it was unable to submit factor information on a more-specific basis, its submissions were timely, verifiable, and the methodology used to determine costs on an FOP CONNUM basis so as to calculate an accurate dumping margin using Fangda Group's information was reasonable.

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

We find that the Fangda Group failed to report CONNUM-specific FOP data as requested by the Department. As discussed below, the Department's questionnaire required respondents to report FOP data on the basis of power level, diameter,<sup>23</sup> and length, inter alia, of the merchandise under

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<sup>23</sup> While one of the Fangda Group companies, Fushun Carbon, excluded consumption quantities for some non-

consideration. The Fangda Group, however, reported its FOP data based on power level (*i.e.*, the Fangda Group’s “CONNUM-specific” consumption quantities did not vary by the length and diameter of the electrode). At verification, the Department found that the Fangda Group companies maintained production records that would have allowed it to report FOP data on a basis closer to CONNUM-specific that would have taken into account diameter and length. Further, at verification, with the exception of Fushun Carbon, the Department found that the Fangda Group failed to exclude data for larger diameter, non-subject merchandise from the FOP data reported to the Department.

The Fangda Group initially failed to disclose that it was not reporting CONNUM-specific FOP data, and failed to explain its reporting methodology. The Department first instructed the Fangda Group to report CONNUM-specific FOP data in its Section D questionnaire. See the Fangda Group’s June 2, 2008, Section D Response at D-9. In response to this request, the Fangda Group reported FOP data for three of its producers, but did not inform the Department that it was limiting its reporting of FOP data by only reporting based on power level (*i.e.*, that it was not reporting on the basis of other diameter and length). See id. Further, the Fangda Group failed to timely submit required FOP reconciliation worksheets that would have explained its FOP reporting methodology. See the Department’s Section D Questionnaire at Appendix V (instructing respondents to submit FOP reconciliations together with the Section D response). We further note that the Fangda Group requested and received a 16-day extension of the deadline to submit its response to the Department’s Section D questionnaire but did not indicate that it was withholding the required FOP reconciliation worksheets. See the Fangda Group’s May 20, 2008, extension request. Accordingly, the Fangda Group hindered the Department’s ability to identify and address the deficiencies in the Fangda Group’s FOP reporting early in this proceeding.

Subsequently, the Department made its second request for a FOP reconciliation from the Fangda Group. See the Fangda Group’s June 26, 2008, Supplemental Section D Response (Part I), at 6-9. Although the Fangda Group’s reconciliation lacked a complete narrative explanation of its reporting methodology, the Department was able to determine that the Fangda Group failed to report CONNUM-specific FOP data that was required by the Department’s Section D questionnaire.

On July 24, 2008, the Department again requested that the Fangda Group report CONNUM-specific FOP data. Specifically, the Department’s July 24, 2008, supplemental questionnaire contained the following instructions:

The Department’s questionnaire required respondents to report CONNUM-specific per-unit consumption quantities for each factor of production. Although the Fangda {Group} Respondents did not state that they were not reporting CONNUM-specific consumption quantities, it appears that they only reported per-unit consumption quantities by power level, and did not report CONNUM-specific

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subject larger diameter graphite electrodes from the FOP data reported to the Department, none of the Fangda Group companies reported FOP data in accordance with the Department’s instructions, which assigned different CONNUMs to electrodes that fell within different diameter ranges.

FOPs which take into account CONNUM characteristics such as diameter and length. Please report CONNUM-specific factors of production data.

In response to the Department's request, the Fangda Group reported that, "{p}ower level and diameter are maximum common factors of production facilities as far as we could recognize according to the original records of the three production facilities." See the Fangda Group's August 1, 2008, 5<sup>th</sup> Supplemental Response, at 2-3. Accordingly, the Fangda Group stated that it reported FOP data based on two of the CONNUM characteristics, the power level and diameter of the electrode. See id.

At verification, however, the Department made the following finding with respect to producer Fushun Carbon:

After reviewing the recipes and the allocation of costs based on these recipes, we noted that these recipes were used in cost allocation worksheets to allocate costs and consumption quantities to each product produced based on the product's power level, diameter, and length. However, in all other cost accounting records, including other cost records for the forming stage, {citation omitted} Fushun Carbon accumulated costs for products by power level and diameter range. Fushun Carbon had not previously disclosed that it used recipes in the forming stage to allocate actual costs to products based on the product's power level, diameter, and length. We asked officials why they only reported consumption quantities to the Department based on a product's power level and diameter range rather than its power level, diameter, and length. Officials stated that they only reported consumption quantities based on power level and diameter range because, except for the cost allocation worksheets that allocated costs based on recipes, Fushun Carbon's other cost accounting records, identified costs based only on power level and diameter range and these costs could be reconciled to Fushun Carbon's income statement. We then asked officials if the cost allocation worksheets that allocated costs based on recipes could be reconciled to other cost records which in turn could be reconciled to the income statement. Company officials stated that they could be reconciled.

See Memorandum to the File through Howard Smith, Program Manager, Office 4, AD/CVD Operations, concerning, "Verification of the Questionnaire Responses of Fushun Carbon Co., Ltd.," dated October 27, 2008, at 18-19 (Fushun Carbon Verification Report).

The Department also made virtually identical findings with respect to Fangda Carbon. Specifically, the Department found:

After reviewing the recipes and the allocation of costs based on these recipes, we noted that these recipes were used in certain cost allocation worksheets to allocate costs and consumption quantities to each product produced based on the product's power level, diameter, and length. However, in all other cost accounting records, including other cost records for the forming stage, {citation omitted} Fangda Carbon accumulated costs for products by power level and diameter range. Fangda Carbon had not previously disclosed that it used recipes in the forming stage to allocate actual costs to products based on the product's power level, diameter, and length . . . . We then asked officials if the cost allocation worksheets that allocated costs based on recipes could be reconciled to other cost records which in turn could be reconciled to the income statement. Company officials stated that they could be reconciled.

See Memorandum to the File through Howard Smith, Program Manager, Office 4, AD/CVD Operations, concerning, "Verification of the Questionnaire Responses of Fangda Carbon New Material Co., Ltd.," dated October 27, 2008, at 19 (Fangda Carbon Verification Report).

Furthermore, the Department made the following finding with respect to Chengdu Rongguang:

After reviewing the recipes and the allocation of costs based on these recipes, we noted that these recipes were used in cost allocation worksheets to allocate costs and consumption quantities to each product produced based on the product's power level, diameter, and length. {Citation omitted}. However, in all other cost accounting records, including other cost records for the forming stage, Chengdu Rongguang accumulated costs for products by only power level. Chengdu Rongguang had not previously disclosed that it used recipes in the forming stage to allocate actual costs to products based on the product's power level, diameter, and length.... We then asked officials if the cost allocation worksheets that allocated costs based on recipes could be reconciled to other cost records which in turn could be reconciled to the income statement. Company officials stated that they could be reconciled. Furthermore, although, during the course of the investigation, the Fangda Group stated that it reported per-unit consumption quantities for factors of production based on power level and diameter, Chengdu Rongguang only took power level into account in reporting consumption quantities, not diameter.

See Chengdu Rongguang Verification Report at 7-8.

Thus, the record shows that the Fangda Group companies could have reported FOP on a basis that is far more CONNUM-specific than the one used, which only took power level into account. While some of the production records indicate the same consumption quantities for electrodes of more than one length, the sample of production records taken by the Department at verification show that the majority of production recipes reflect inputs for electrodes of a unique length (i.e., most of the production recipes do not indicate that they can be used to produce electrodes of more than one length). See, e.g., Chengdu Rongguang Verification Report, at Exhibit 2-C. Therefore, it is clear that the Fangda Group could have used its production records to report the consumption of raw materials on the basis of length.

Similarly, the record developed at verification demonstrates that while the Fangda Group claimed that it reported its FOP based on both power level and diameter, the Fangda Group actually only reported FOP data on the basis of power level. See Chengdu Rongguang Verification Report, at 7-8. However, the record indicates that the Fangda Group maintained production records that allowed it to report consumption of raw materials on the basis of diameter. See id.

We disagree with the Fangda Group's argument that its methodology should be accepted because power level is the only CONNUM characteristic common to all three affiliated producers. As noted, each Fangda Group producer examined at verification maintained records that could have been used to report FOP data on the basis of power level, length, and diameter. Thus, the record shows that power level is not the only characteristic common to all three affiliated producers. Further, at no time during this proceeding did the Department require the Fangda Group companies to use a single common denominator to report all FOP data. Rather, the Department required CONNUM-specific FOP data for each company in a CONNUM-specific dataset, and a weighted-average consolidated dataset that reflected the combined production experience of all participating companies.

We also agree with petitioners that the Fangda Group should have excluded non-subject merchandise from the FOP data reported for Fangda Carbon. The Fangda Group certified that it had reported FOP data in a manner that would have excluded non-subject merchandise. Specifically, the Fangda Group certified that it reported its FOP based on power level and diameter, meaning that the Department had a reasonable expectation that the Fangda Group had limited its reporting to only subject, small diameter graphite electrodes (i.e., electrodes 16 inch or less in diameter). Moreover, the Department's verification of the Fangda Group demonstrates that Fangda Carbon, the production facility at issue, maintained records that would have allowed it to exclude most, if not all, of the consumption quantities for large diameter graphite electrodes (i.e., non-subject merchandise) from the FOP data submitted to the Department. The Department made the following finding at verification:

. . . since Fangda Carbon produced graphite electrodes with diameters outside the scope of this investigation and it did not take diameter into account in reporting to the Department, the reported consumption quantities include consumption quantities for out of scope merchandise. When we raised the above observations to Fangda Carbon officials they stated that the diameter ranges used

in each processing stage to accumulate costs and consumption quantities for a particular product vary (e.g., Fangda Carbon may record costs and consumption quantities for a particular power level in one processing stage using one diameter range but record costs and consumption quantities for that power level using a different diameter range in another processing stage). Fangda Carbon officials claimed that its failure to use consistent diameter ranges for a product in each processing stage prevented them from reporting consumption quantities on a diameter specific basis. However, despite this inconsistency, we noted that the records itemizing costs and consumption quantities by diameter ranges would have allowed the company to exclude most of the consumption quantities for out of scope merchandise, which the company did not do. While discussing Fangda Carbon's failure to report consumption quantities that took into account the diameter of the product, Fangda Carbon officials pointed to examples where the differences between the per-unit costs in various processing stages for graphite electrodes of different diameter ranges differed by what they claimed were small amounts or did not differ at all. Conversely, we pointed to certain examples where the per-unit costs varied by larger amounts.

See Fangda Carbon Verification Report at 19-20.

Thus, the record demonstrates that the Fangda Group did not exclude Fangda Carbon's non-subject merchandise from its FOP data. Moreover, as the verification report shows, Fangda Carbon maintained records in the ordinary course of business that permitted the exclusion of most, if not all of the subject merchandise from Fangda Carbon's FOP data. The Department cannot determine the impact of the Fangda Group's reporting failure. However, it is clear from the excerpt of the verification report cited above that Fangda Carbon's per-unit costs for subject and non-subject merchandise varied.

#### **D. Other Reporting Failures**

As discussed in greater detail below, petitioners allege that a number of other Fangda Group reporting failures involving such needed information as energy consumption and sales data support the application of total AFA.

The Fangda Group argues that some of the petitioners' allegations are baseless, while others concern minor errors.

#### Electricity

According to the petitioners, the Fangda Group misled the Department and failed to fully report its electricity consumption to the Department. Specifically, the petitioners argue that the Fangda Group excluded the amount of energy consumed by certain production departments and failed to

report the actual amount of energy consumed, but rather it reported estimated amounts based on meter readings.

Petitioners state that the Department will only excuse respondents from reporting energy FOP when energy is not an important production factor, but argue that energy is a significant factor in the production of graphite electrodes. Moreover, petitioners assert, the Fangda Group had an obligation to inform the Department that it was not fully reporting its electricity consumption.

In rebuttal, the Fangda Group argues that it reported all electricity consumed in the production of graphite electrodes and that it properly excluded all electricity associated with overhead expenses. Additionally, the Fangda Group argues that it reported the actual amount of electricity consumed based on the actual meter reading of the production facilities. The Fangda Group argues that the electric company reads the same electricity meters that the company does, with the only difference between the electricity bill and the company's cost records being a slight difference in the time period. The Fangda Group argues that any difference between the Fangda Group's reported actual consumption and the consumption reflected in the electric company's meter readings is negligible.

#### Natural Gas

Petitioners argue that Fangda Carbon failed to report the actual amount of natural gas consumed in the production of graphite electrodes. Specifically, the petitioners note that the Department found at verification that Fangda Carbon used internal records to report an estimated quantity of natural gas consumed during a period that does not cover the entire POI. Petitioners consider this to be a significant failure because, they assert, Fangda Carbon maintained records that enable it to report actual POI consumption. Furthermore, petitioners contend, Fangda Carbon's use of natural gas in the production process is unique among the Fangda Group producers and, therefore, the use of another Fangda Group producer's data as FA is not appropriate.

However, the Fangda Group argues that neither the Department's verification reports nor the company itself ever stated that the reported consumption of natural gas was an estimated quantity. Rather, the Fangda Group argues, it reported Fangda Carbon's actual natural gas consumption based on meter readings taken by the company during a slightly different period than the gas company. The Fangda Group argues that any difference between Fangda Carbon's reported actual consumption and the consumption reflected in the gas company's meter readings is negligible.

#### Metallurgical Coke

Furthermore, petitioners argue that the Department is unable to value metallurgical coke because the Fangda Group did not fully report the different types of metallurgical coke used as energy inputs. Petitioners contend that it is too late for new factual information to be placed on the record to correct this reporting failure. Petitioner further claims that the value of metallurgical coke varies significantly depending on its components.

The Fangda Group argues that metallurgical coke consumption should not be broken out into metallurgical coke types because the surrogate value of metallurgical coke categorized in Indian HTS category used as a surrogate value in the Preliminary Determination does not differentiate between metallurgical coke in powder, granular, or pellet forms. The Fangda Group also argues that petitioners have not provided any basis why metallurgical coke consumption should have been broken out by metallurgical coke types. Furthermore, the Fangda Group claims that the Department verified that both the total consumption of metallurgical coke and the overall production process were consistent with what was described by the Fangda Group in its questionnaire response.

#### Self-Calcined Coke

Petitioners also assert that the respondents failed properly report calcined coke. Specifically, the respondents note that at verification the Department found that Fangda Carbon incorrectly reported the per-unit consumption of self-calcined coke, rather than the inputs consumed in the production of self-calcined coke. The petitioners claim that this verification finding contradicts statements made by the Fangda Group prior to verification.

The Fangda Group, however, claims that it reported the small amount of petroleum coke used to produce self-calcined coke but did not report the amount of energy and labor used to produce the self-calcined coke. The Fangda Group claims that this small amount of self-calcined coke is similar to a recycled input and that the energy and labor used to produce the self-calcined coke were discussed with Department verifiers.

#### Market Economy Purchases

In addition, petitioners argue that the Department's verification revealed that Chengdu Rongguang and Fangda Carbon significantly overstated their market economy purchases of needle coke.

In rebuttal, the Fangda Group asserts that the discrepancies found at verification which relate to imported needle coke have no impact on whether market economy prices for needle coke should be used as the basis for the surrogate value of needle coke because the total quantity of market economy purchases still substantially exceeds the regulatory threshold of 33 percent of total purchases.

#### Coal Tar Pitch

Petitioners also claim that the Fangda Group wrongfully removed the FOP reported for coal tar pitch from its submitted data.

However, the Fangda Group argues the start-up costs in the workshop where coal tar pitch was produced were regarded as construction in progress costs instead of production costs. In addition, the Fangda Group argues, the verifiers noted that workshop at issue did not have any production during the POI.

### Packing Labels

Petitioners also argue that the Fangda Group failed to report its per-unit consumption of packing labels despite confirming that it accurately reported all packing material used to pack subject merchandise, including packing labels.

The Fangda Group states that it admitted to the verifiers that it inadvertently missed reporting the labels that were affixed to packages of subject merchandise. According to the Fangda Group, the packing labels' contribution to {per-unit} NV should be very small, probably less than one cent.

### Nitrogen, Water, and Steam

Petitioners also contend that the Fangda Group failed to report FOP data for three energy inputs: nitrogen, water, and steam. The petitioners note that the Department's Section D questionnaire instructs respondents to inform the Department if they use any raw materials that they believe should be classified as overhead items, and to provide a list of such raw materials. However, the petitioners argue, the Fangda Group did not provide such a list of raw materials. The petitioners note that the Department has applied AFA in instances where the respondent failed to report required inputs.

The Fangda Group argues that compressed air (nitrogen), water, and steam used to clean and cool production equipment are overhead items, and, therefore, properly excluded from the FOP data reported to the Department.<sup>24</sup> Moreover, the Fangda Group argues that these inputs are properly considered overhead expenses and are fully accounted for by the Department's application of surrogate overhead financial ratio. According to the Fangda Group, these items are neither direct material inputs incorporated into the graphite electrodes themselves, nor processing materials which are consumed or destroyed in the production process. The Fangda Group further argues that these inputs meet the definition of manufacturing overhead contained in Charles Horngren, Cost Accounting, A Managerial Emphasis (2002), a treatise often relied upon by the Department.

### Underreported U.S. Sales

Petitioners also claim that the Department's verification revealed that Beijing Fangda underreported its U.S. sales. Specifically, petitioners contend that the Department's verification found that the exporter Beijing Fangda underreported its December 2007 sales by 46.74 percent. The petitioners note that verifiers examined a selected subset of Beijing Fangda's sales data, and argue that all Beijing Fangda's sales data are unreliable. Moreover, the petitioners argue that discrepancies found at verification for each company in connection with the Department's critical circumstances determination supports a finding that all reported U.S. sales data are unreliable.

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<sup>24</sup> See, e.g., Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

In rebuttal, the Fangda Group argues that the discrepancy noted by the petitioner relates only to critical circumstances data and that the verification report indicates that the Fangda Group accurately reported its U.S. sales.

#### *U.S. Warehousing Expenses*

Additionally, petitioners assert that the Department's verification revealed that Fangda Carbon and Chengdu Rongguang failed to report U.S. warehousing expenses. Petitioners argue that the companies are responsible for a substantial portion of reported sales and, therefore, the failure to report all U.S. direct selling expenses is significant.

The Fangda Group, however, argues that it is not required to report direct selling expenses incurred in the PRC in a non-market economy case. The Fangda Group further states that the Department's questionnaire did not require it to report the PRC warehousing expenses at issue.

#### *Unverifiable Critical Circumstances Data*

Petitioners argue that the shipment data submitted by the Fangda Group were unverifiable. Specifically, petitioners note that each Fangda Group company did not use company records that reflect shipment date to report shipment information to the Department.

In rebuttal, the Fangda Group argues that it reported its shipment data on a consistent basis and, thus, the Department should still rely on these data in its critical circumstances analysis. The Fangda Group further argues that an adverse inference is not warranted because the Fangda Group did not benefit from the shipment data reporting methodology; the Department found critical circumstances exist for the Fangda Group in the Preliminary Determination.

See the Critical Circumstances section, below, for further discussion of issues raised regarding critical circumstances.

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

As noted below, there were a number of other reporting deficiencies discovered at verification. These deficiencies, when considered with the above reporting deficiencies, call into question the reliability of the Fangda Group's data.

The Fangda Group did not inform the Department that it was excluding the amount of electricity consumed by certain departments at Fangda Carbon and Chengdu Rongguang. See Fangda Carbon Verification Report at 28-31, and Chengdu Rongguang Verification at 18-19. Also, it was not until verification that the Department learned that the Fangda Group had reported electricity consumption for a period that is not fully contemporaneous with the POI. See Fushun Carbon Verification Report at 27, Fangda Carbon Verification Report at 28-31, and Chengdu Rongguang Verification at 18-19.

Additionally, the Fangda Group did not inform the Department that it had reported natural gas consumption for Fangda Carbon for a period that is not fully contemporaneous with the POI.

The Fangda Group used the same reporting period for natural gas as it used for electricity. See Fangda Carbon Verification Report at 31-33.

Moreover, the Fangda Group failed to inform the Department that it was not reporting the separate factors used to produce self-calcined needle coke. At verification the Department found that producer Fangda Carbon produced calcined needle coke. See Fangda Carbon Verification Report, at 28. However, Fangda Carbon reported the per-unit consumption of self-produced calcined needle coke to the Department rather than separately reporting the per-unit consumption of inputs used to produce calcined needle coke. See id. At verification, company officials acknowledged that they had misreported the FOP for self-calcined needle coke. See id.

Further, at verification, the Department found that the Fangda Group had failed to properly describe the physical characteristics of the metallurgical coke used to produce graphite electrodes. By failing to provide a proper description of the input, the Fangda Group prevented the Department and interested parties from obtaining proper surrogate values. While it is true that the Indian import category used to value metallurgical coke at the Preliminary Determination does not differentiate among metallurgical coke in powder, granular, or pellet forms, it does not follow that the Fangda Group was relieved of its obligation to describe the physical characteristics of its inputs. In selecting among potential surrogate values the Department will consider, inter alia, the specificity of the input. See, e.g., Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Review, 73 FR 14216 (March 17, 2008) and accompanying Issues and Decision Memorandum at Comment 6. In failing to accurately describe the physical characteristics of the different types of metallurgical coke used in response to the Department's request, the Department was prevented from analyzing whether the Indian import category used to value metallurgical coke was specific to the inputs used by the Fangda Group.

Also, the Department found at verification that the Fangda Group failed to report labels used to pack subject merchandise, despite a specific request from the Department that the Fangda Group confirm that it reported all packing inputs, including labels. See the Fangda Group's July 8, 2008, supplemental response at 14; see also Fangda Carbon Verification Report at 34, and Chengdu Rongguang Verification Report at 20.

Furthermore, the Fangda Group should have identified its use of nitrogen, water, and steam, which was discovered at verification, even if the Fangda Group considered these inputs to be overhead items. See the Fangda Group's June 2, 2008, Section D Response at D-1, and D-14.

In addition, at verification the Department found that the Fangda Group failed to identify warehousing as part of the domestic movement expenses that it incurred in shipping subject merchandise to the United States.

What is more, at verification, the Department found significant reporting errors in the shipment data that the Fangda Group reported in connection with the Department's critical circumstances determination. Specifically, we found that Fushun Carbon over-reported its August 2007 shipment volume by 43.92 percent, Fangda Carbon under-reported its August 2007 shipment

volume by 44.79 percent, and Beijing Fangda under-reported its December 2007 shipment volume by 46.74 percent. See Fushun Carbon Verification Report at 6-8, Fangda Carbon Verification Report at 5-6, Beijing Fangda Verification Report at 6. However, contrary to petitioners' claim, these reporting errors did not affect the U.S. sales database (there is no indication in the Department's verification reports that the Fangda Group misreported its U.S. sales). See Fushun Carbon Verification Report at 6-8, Fangda Carbon Verification Report at 5-6, Beijing Fangda Verification Report at 6.

In conclusion, the Fangda Group's numerous reporting deficiencies, discussed above, affect a significant portion of NV, including direct materials and energy.<sup>25</sup>

## **F. Application of Total Adverse Facts Available**

Petitioners contend that the extent and the nature of the Fangda Group's failures at verification warrant the application of total AFA. According to petitioners, the Department's verification yielded evidence that the Fangda Group withheld critical information and knowingly submitted unverifiable FOP information and U.S. sales data.

Petitioners argue that the statutory requirement for the application of total facts available (FA) under section 776(a) of the Act has been met. Specifically, petitioners state that the Fangda Group withheld information requested by the Department and failed to provide information in the form and manner requested by the Department. Petitioners argue that the Fangda Group's withholding of information rendered its submitted data materially inaccurate, incomplete, and unreliable, which prevents the Department from calculating an accurate dumping margin. Accordingly, petitioners argue, the Fangda Group has impeded the process.

Petitioners believe that it is not appropriate to use partial FA in a case such as this when the missing information is so fundamental to the proceeding that gap filling measures are unwarranted. Citing Steel Authority of India,<sup>26</sup> petitioners describe the Department's "long-standing practice {of rejecting} a respondent's data in toto when the essential components of the response are so riddled with errors and inaccuracies as to be unreliable." Petitioners contend that, pursuant to section 776(b) of the Act, an adverse inference is warranted, and urge the Department to apply the highest rate in the Department's initiation notice as total AFA.

In rebuttal, the Fangda Group argues that it acted to the best of its ability. The Fangda Group states that the Department's verification of the Fangda Group lasted almost a month; that verifiers acknowledged that it was one of the most difficult cases that they had ever seen and that

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<sup>25</sup> Although the petitioners also noted that the Department found errors in the market economy purchase figures for needle coke reported by the Fangda Group, the errors discovered at verification did not materially change the quantity of market economy purchases. See Fushun Carbon Verification Report at 25-26, Fangda Verification Report at 26-27, and Chengdu Rongguang Verification Report at 16. Further, the Department found no evidence that the alleged unreported quantity of coal tar pitch discussed by petitioners was used to produce merchandise under consideration. See Fangda Carbon Verification Report at 20, 23, and Exhibit 17.

<sup>26</sup> Steel Authority of India v. United States, 149 F. Supp. 2d 921, 928 (Ct. Int'l Trade 2001) (Steel Authority of India); aff'd on remand, 25 C.I.T. 1390 (2001).

more than 1000 numbers supplied by the Fangda Group verified. The Fangda Group contends that many statements made by verifiers indicate that verification was successful. Moreover, the Fangda Group asserts, the Department's verification report implies that the Fangda Group should have performed impossible tasks, such as collecting FOP data from numerous unaffiliated tollers and reporting CONNUM-specific FOP data reflecting physical characteristics such as electrode length and diameter.

Petitioners, however, argue that the Fangda Group was not, as it alleges, asked to perform an impossible task by the Department. In support of their argument, the petitioners argue that the Fangda group was required to: (1) report the same information required of any participant in an investigation; (2) seek alternative reporting requirements if it was not able to report information in the form and manner requested; and (3) ensure that the information provided conforms with its books and records. Petitioners assert that the Fangda Group never indicated that it could not comply with the Department's requests for information nor sought permission to alter the normal reporting requirements.

Petitioners further argue that the Fangda Group's assertion that it cooperated to the best of its abilities with the Department's requests for information lacks merit because the Fangda Group provided inaccurate information that was at odds with its books and records.

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

Pursuant to section 776(a) of the Act, we have determined to apply total FA to the Fangda Group in this final determination. In addition, the Department finds that the Fangda Group failed to cooperate to the best of its ability to provide information requested by the Department and, therefore, the Department has used an adverse inference in selecting among the facts otherwise available. See section 776(b) of the Act.

#### **Use of Facts Available**

The Department finds that the use of facts otherwise available is warranted with respect to the Fangda Group pursuant to section 776(a) of the Act. In general, section 776(a)(1) and (2) of the Act state that the Department may, subject to section 782 of the Act, use facts otherwise available in reaching its determination if: (1) the necessary information is not available on the record, or (2) an interested party or any other person (A) withholds information that has been requested by the administering authority or the Commission under this subtitle, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act. In this case, the information missing from the record impacted the entire FOP dataset submitted by the Fangda Group. For example, (1) the absence of FOP data from one producer calls into question the reliability of all reported FOP, (2) the lack of data for 13 tollers affects the reporting of multiple FOP, such as energy and labor, and (3) the failure to report CONNUM-specific FOP data affects all components of NV, as well as the ability to make price-to-NV comparisons.

First, we find that the Fangda Group withheld requested information concerning production by Hefei Carbon. See Section 776(a)(2)(A) of the Act. As a consequence of the Fangda Group's failure to report FOP data for Hefei Carbon, the Department cannot calculate an accurate dumping margin for the Fangda Group. The Department cannot quantify the impact of the missing FOP data on the dumping margin calculation because the record lacks essential information needed to do so. For example, the record lacks information regarding all of the models produced by Hefei Carbon, and the production quantity of the models produced by Hefei Carbon. Given that Hefei Carbon's production capacity indicates that it is a significant producer of graphite electrodes, the impact of the missing data on the Department's dumping margin calculation could be significant. See Fangda Carbon Verification Report at Exhibit 9. Further, we note that the absence of Hefei Carbon's FOP data from the Fangda Group's FOP data calls into question the reliability of all FOP data because none of the weighted-average FOP reflect Hefei Carbon's production experience. Moreover, because the Fangda Group's failure to report Hefei Carbon's FOP data hinders the Department's ability to calculate an accurate dumping margin, we find that the Fangda Group has impeded this proceeding within the meaning of section 776(a)(2)(C) of the Act.

Second, we find that the Fangda Group withheld information regarding its use of tollers. See section 776(a)(2)(A) of the Act. As is the case with the missing Hefei Carbon FOP data, the Department cannot quantify the impact of the Fangda Group's failure to report FOP data for 13 undisclosed tollers; however, we note that the production processes performed by these tollers are energy intensive. See, e.g., the Fangda Group's June 2, 2008, Section D Response at D-3-1 – D-3-4. Without accurate FOP data for the inputs consumed by these tollers, the Department cannot calculate an accurate dumping margin for the Fangda Group. In this regard we find that the Fangda Group has significantly impeded this proceeding within the meaning of section 776(a)(2)(C) of the Act. The FOP information for these tollers is needed to ensure that the Department has accurately reflected the value of these services in its NV calculation.

Third, the Department finds that the Fangda Group withheld CONNUM-specific FOP information requested by the Department. See section 776(a)(2)(A) of the Act. As a result, the Department cannot match U.S. sales to NVs that reflect values associated with the unique physical characteristics of the merchandise. The Department, therefore, cannot calculate an accurate dumping margin using the FOP data reported by the Fangda Group. In this regard, we find that the Fangda Group has impeded this proceeding within the meaning of section 776(a)(2)(C) of the Act.

Fourth, the Department finds that the Fangda Group submitted deficient and unreliable data regarding, inter alia, electricity consumption, natural gas consumption, the inputs used to produce self-calcined needle coke, and the physical characteristics of its metallurgical coke. Furthermore, the Fangda Group withheld information regarding its use of nitrogen, water, and steam, and certain packing materials.

Fifth, the Fangda Group submitted inaccurate, unreliable, and unverifiable critical circumstances data. As noted above, the Department found significant discrepancies with all of the shipment data examined at verification.

In light of the foregoing, we find that we do not have information to calculate an accurate NV. Further, the Department lacks the information needed to account for the missing information in calculating an accurate NV. Therefore, the Department must rely on FA.

### **Use of An Adverse Inference**

In selecting from among the facts otherwise available, pursuant to section 776(b) of the Act, an adverse inference is warranted when the Department has determined that a respondent has “failed to cooperate by not acting to the best of its ability to comply with a request for information.”<sup>27</sup> In such a case, the Act permits the Department to use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.”<sup>28</sup>

Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>29</sup> The CAFC, in Nippon, provided an explanation of the “failure to act to the best of its ability” standard, stating that the ordinary meaning of “best” means “one’s maximum effort,” and that the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do.<sup>30</sup> The CAFC acknowledged, however, that while there is no willfulness requirement, “deliberate concealment or inaccurate reporting” would certainly be sufficient to find that a respondent did not act to the best of its ability, although it indicated that inadequate responses to agency inquiries “would suffice” as well.<sup>31</sup> Compliance with the “best of its ability” standard is determined by assessing whether a respondent has put forth its maximum effort to provide the Department with full and complete answers to all inquiries in an investigation.<sup>32</sup> The Federal Circuit further noted that while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.<sup>33</sup>

As noted above, at verification, the Department found that Hefei Carbon maintained sales and production records that would have allowed the Fangda Group to report the requested FOP data. The Fangda Group made no claim or showing that it reviewed the U.S. sales data submitted in this investigation to determine which models produced by Hefei Carbon during the POI would have been classified under CONNUMs reported to the Department. It is clear, therefore, that the Fangda Group failed to put forth the maximum effort to comply with the Department’s request for information.

Moreover, despite numerous requests to report all FOP used to produce merchandise under consideration, the Fangda Group never reported all of its tollers in its responses to the Department nor did it identify them at verification. It was not until the Department verified the last Fangda Group producer that it discovered the unreported tollers. Thus, we find the Fangda

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<sup>27</sup> See section 776(b) of the Act.

<sup>28</sup> Id.; see also Statement of Administrative Action (SAA) accompanying the URAA, H.R. Rep. No. 103-316 at 870 (1994).

<sup>29</sup> See SAA at 870.

<sup>30</sup> See Nippon Steel Corporation v. United States, 337 F. 3d 1373, 1382 (Fed. Cir. 2003) (Nippon).

<sup>31</sup> Id. at 1380.

<sup>32</sup> Id. at 1382.

<sup>33</sup> Id. at 1382.

Group failed to cooperate to the best of its ability within the meaning of section 776(b) of the Act, and, therefore, in selecting from among the FA, the Department has employed an adverse inference. We note that the Department has found that it is appropriate to apply AFA to companies that fail to disclose tollers or subcontractors. Specifically, we note that in Wooden Bedroom Furniture, the Department found that a respondent failed to act to the best of its ability because the company failed to fully disclose its use of subcontractors or tollers. See Wooden Bedroom Furniture, at Comment 26. In Wooden Bedroom Furniture, the Department applied AFA to a respondent that failed to notify the Department of its difficulty in obtaining FOP data from all of its subcontractors and instead relied on sampling to report FOP data for subcontractors. Id. In the instant investigation, there is no record evidence or claim that the Fangda Group even attempted to gather FOP data from its undisclosed tollers, or that it experienced difficulty doing so. Therefore, we find that the Fangda Group's failed to make the maximum effort to comply with the Department's request for FOP data.

We also find that in failing to inform the Department that the Fangda Group's producers maintained production records that enabled the Fangda Group to report FOP data that took into account more of the physical characteristics reflected by the CONNUM (i.e., that it could have reported FOP data on the basis of diameter and length), the Fangda Group failed to cooperate to the best of its ability within the meaning of section 776(b) of the Act. Thus, in selecting among the FA, the Department has employed an adverse inference. As noted above, to act to the best of one's ability within in the meaning of section 776(b) of the Act, an interested party must put forth the maximum effort to comply with the Department's request for information. In the instant case, the Department made repeated requests that the Fangda Group provide CONNUM-specific FOP data that reflected the length and diameter of the merchandise. In response to these requests, the Fangda Group inaccurately stated that it had reported CONNUM-specific FOP data on the basis of diameter, and that it was not able to report FOP data that reflected length. However, the Fangda Group did not report FOP data based on diameter and actually included data for non-subject merchandise in its FOP data. At no time did the Fangda Group disclose to the Department that all of its factories maintained production records that reflected length and diameter; the Department discovered these records at verification. Therefore, we find that the Fangda Group failed to act to the best of its ability.

We also find that the Fangda Group's numerous reporting failures concerning electricity, natural gas, metallurgical coke, self-calcined coke, and nitrogen, water, and steam constitute failures by the Fangda Group to act to the best of its ability. As the verification findings discussed above demonstrate, the Fangda Group could have reported the required information relying on its own books and records, or, at a minimum, could have informed the Department that it was not reporting the information in the form and manner requested (e.g., the failure to notify the Department that it was not reporting FOP data that were fully contemporaneous with the POI).

Although the Department confirmed, at verification, the accuracy of certain data, such as U.S. sales, we find that the level of deficiencies in the Fangda Group's submissions, compels us to conclude that the Fangda Group's response cannot be relied upon. The Court of International Trade (the Court) has upheld the Department's reliance on total AFA even when a portion of a respondent's data has passed verification. In Steel Authority of India, Ltd. v. United States, certain portions of respondent's data were verified, but the respondent failed other portions of

verification and conceded that its home market and cost data were not usable. See Steel Authority of India, 149 F. Supp. at 928-29. The Court specifically upheld the Department’s determination that deficiencies in portions of information submitted can undermine the reliability of the entirety of a respondent’s submissions, and recognized that the Department requires accurate information to make price-to-price comparisons in reaching its determination. See Steel Authority of India, 149 F. Supp. at 927-28 (“interpreting the ‘use of certain information’ provision to refer to all the information submitted by an interested party is a reasonable construction of the statute.”)

The Court further explained that reliance on partial information submitted by interested parties would allow for manipulation of the Department’s administrative process through self-selecting reporting of only beneficial information. Id. “Respondents, not the Department, would have the ultimate control to determine what information would be used in the margin calculation. This is in direct contravention of the policy behind the use of FA.” Id. Moreover, the Court recognized the Department’s “long-standing practice of limiting the use of partial FA.” Id.

The Court recently reached the same result in a case involving the PRC. In Universal Polybag,<sup>34</sup> the Department relied on total AFA where the respondent withheld information from the Department throughout its review and, additionally, the Department identified numerous reporting failures by the respondent during verification. Universal Polybag, 577 F. Supp. 2d at 1290-98. As in the instant case, some information submitted was verified, however, citing Steel Authority of India, the Court recognized that the Department should not be compelled to piece together an antidumping margin where it is missing information critical to the calculation of NV. Id., at 1296-98. The Court emphasized that the respondent’s uncooperative behavior further bolstered the Department’s determination that the entirety of respondent’s information should be disregarded in Commerce’s calculation, including information that the Department verified. Id. at 1297.

Because the Fangda Group’s failures to report complete and accurate information render its submitted data wholly unreliable, we cannot use these data to calculate an accurate dumping margin for the Fangda Group. Accordingly, we have rejected the Fangda Group’s response in its entirety and have assigned the Fangda Group a dumping margin based on total AFA.

Moreover, with regard to our critical circumstances determination, we find that the Fangda Group failed to act to the best of its ability in submitting shipment data that was not based on shipment date. At verification, as discussed above, the Department found that the Fangda Group maintained records in the ordinary course of business that would have allowed it to report the requested shipment data. For the purposes of our critical circumstances determination, as total AFA, we have determined that the Fangda Group’s imports were massive under section 733(e)(1)(B) of the Act. See Comment 4 below regarding critical circumstances.

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<sup>34</sup> Universal Polybag Co., Ltd. v. United States, 577 F. Supp. 2d 1284 (Ct. Int’l Trade 2008) (Universal Polybag).

## **Selection of AFA Rate and Corroboration**

Section 776(b) of the Act authorizes the Department to use, as AFA information derived from: (1) the petition; (2) the final determination from the LTFV investigation; (3) a previous administrative review; or (4) any other information placed on the record.

In selecting a rate for AFA, the Department selects one that is sufficiently adverse “so as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.” See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909 (February 23, 1998). It is the Department’s practice to select, as AFA, the higher of: (a) the highest margin alleged in the petition or (b) the highest calculated rate for any respondent in the investigation. See Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From the People’s Republic of China, 65 FR 34660 (May 31, 2000) and accompanying Issues and Decisions Memorandum at Facts Available. The highest margin alleged in the Petition is 159.64 percent. See the Petition, and Enclosure 4 the January 30, 2008, Addendum to Petition. The Department received no comments from interested parties regarding the dumping margin alleged in the Petition. Since the dumping margin derived from the Petition is higher than the weighted-average margins calculated in this case, we have assigned the Fangda Group a dumping margin of 159.64 percent.<sup>35</sup>

For a discussion of the Department’s corroboration of the AFA rate, see the section entitled, “Corroboration” in the accompanying notice of Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People’s Republic of China, dated concurrently with this memorandum.

### **Comment 4: Whether Critical Circumstances Exist for the Fangda Group, Fushun Jinly, the Separate Rate Applicants, and the PRC-Wide Entity**

Petitioners argue that the Department should make an affirmative finding of critical circumstances for all Chinese producers and exporters, including Fushun Jinly, the Fangda Group, and separate rate respondents. In finding critical circumstances, petitioners claim that the Department should apply total AFA for the failure of Fushun Jinly and the Fangda Group, as part of the PRC-wide entity, to cooperate to the best of their abilities by providing timely, accurate and reliable information in their questionnaire responses, and that these reporting failures have impeded the Department’s investigation. Petitioners claim that in prior cases “when mandatory PRC producers or exporters failed to cooperate with the Department, the Department has extended the adverse inference that critical circumstances exist to all PRC companies that did not obtain a separate rate (i.e., the PRC-wide entity).”<sup>36</sup> Therefore, petitioners claim that AFA is

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<sup>35</sup> The Department incorrectly listed 159.34 percent as the highest petition margin in the Preliminary Determination. In fact, the highest margin alleged in the Petition is 159.64 percent, not 159.34 percent. See the Petition, and Enclosure 4 of the January 30, 2008 Addendum to Petition.

<sup>36</sup> See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper from China, 70 FR 7475, 7476-77 (February 14, 2005) (Tissue Paper); Notice of Final Determination of Sales at Less Than Fair Value:

warranted for the Department's final determination and its critical circumstances determination because Fushun Jinly and the Fangda Group failed to cooperate to the best of their abilities. Petitioners contend that in examining whether critical circumstances exist for the PRC-wide entity, the Department should disregard the company-specific shipment data submitted by Fushun Jinly and the Fangda Group for the final determination. Petitioners submit that, as AFA, the Department should instead rely on the unadjusted import statistics published by the ITC for the same base and comparison periods examined in the Preliminary Determination. According to petitioners, the ITC data show that subject imports from the PRC-wide entity increased nearly nineteen percent shortly after the petition was filed. Alternatively, petitioners argue that should the Department determine that total AFA for Fushun Jinly and the Fangda Group is not warranted, information on the record supports an independent determination that critical circumstances exist for Fushun Jinly and the Fangda Group.

Petitioners claim that because there are no reliable data upon which the Department can base a critical circumstances determination for Fushun Jinly and the Fangda Group, the Department should, as it has done in other cases,<sup>37</sup> apply AFA and conclude that there were massive shipments by Fushun Jinly and the Fangda Group. Petitioners note that the Department already made a critical circumstances finding for the Fangda Group in the Preliminary Determination based on the Fangda Group's own reported shipment data, which show massive increases in shipments after the petition was filed. Although the Department found at verification that the Fangda Group failed to accurately report its shipment data, petitioners contend that the Department should continue to rely on the Fangda Group's shipment data, as the best data on the record, in determining whether there were massive imports by the Fangda Group. Therefore, according to petitioners, the Department should continue to find that there were massive shipments by the Fangda Group after the petition was filed, and therefore, should affirm its critical circumstances finding for the Fangda Group.

Petitioners argue that, in the alternative, the Department should rely on the official import statistics published by the ITC, noting that they are the best information available considering the unreliability of the data submitted by Fushun Jinly and the Fangda Group. As discussed above, an examination of the ITC import statistics for the relevant base and comparison periods demonstrates a massive increase in subject imports. Therefore, according to the petitioners, the Department should determine that critical circumstances exist for Fushun Jinly and continue to find, as was done in the Preliminary Determination, that critical circumstances also exist for the Fangda Group.

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Refined Brown Aluminum Oxide (Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina) from the People's Republic of China, 68 FR 55589, 55590 (September 26, 2003) and accompanying Issues and Decision Memorandum at Comment 1; Final Determination of Sales at Less Than Fair Value: Folding Metal Tables and Chairs from the People's Republic of China, 67 FR 20090, 20091 (April 24, 2002); and Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan, 62 FR 51427, 51437 (October 1, 1997) (Roofing Nails).

<sup>37</sup> See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 65 FR 5554, 5561 (February 4, 2000) (the Department determined that there were massive imports based on AFA because the Department was unable to verify respondent's company-specific shipment data); Roofing Nails, and accompanying Issues and Decision Memorandum at Comment 20 (the Department made an adverse inference and determined that there were massive imports because the quantity and value of sales made by a respondent during the period of investigation was unreliable); and Tissue Paper.

Additionally, petitioners argue that, as in the Preliminary Determination, the Department should continue to find that critical circumstances exist for the separate-rate respondents. However, given that Fushun Jinly and the Fangda Group should no longer receive a separate rate, petitioners argue that the Department should not base its critical circumstances finding for the separate-rate respondents on the shipment volumes reported by Fushun Jinly and the Fangda Group, as it did in the Preliminary Determination. Rather, petitioners contend that the Department should base its critical circumstances finding for the separate-rate respondents on the unadjusted ITC import statistics. The ITC import statistics demonstrate a massive increase in subject imports shortly after the petition was filed, and therefore, the Department should conclude that critical circumstances continue to exist for the separate-rate respondents. In the alternative, petitioners argue that should the Department rely on the company-specific shipment data submitted by the Fangda Group, the Department should use the Fangda Group's shipment volume in determining whether there were massive imports from the separate-rate respondents and affirm its critical circumstances finding for respondents receiving a separate rate. The Fangda Group and Fushun Jinly reject petitioners' argument that the Department's critical circumstances determination should be affirmative for all companies on the basis of AFA. Rather, the Fangda Group and Fushun Jinly argue that the Department should base its final determination of critical circumstances upon information contained in the administrative record because company-specific information with respect to export data and the imputation of knowledge of dumping exist for both the Fangda Group and Fushun Jinly.

The Fangda Group and Fushun Jinly argue that, for purposes of the final determination, if the margin found for the Fangda Group and the separate rate companies, including Fushun Jinly, is below 25 percent, there should be no finding of critical circumstances for any party, due to an absence of knowledge by the importer that the merchandise was being sold at less than fair value (LTFV). They further argue that if the final margin for the Fangda Group and the separate rate companies is above 25 percent, the Department should reach the same critical circumstances determination that it reached in the Preliminary Determination based upon the company-specific export data reported by the Fangda Group and Fushun Jinly.

The Fangda Group and Fushun Jinly disagree with petitioners' suggestion that, due to the absence of verified export data from Fushun Jinly, because the Department cancelled verification, the critical circumstances determination with respect to Fushun Jinly should be based on AFA. The Fangda Group and Fushun Jinly claim that Fushun Jinly provided company-specific monthly export information to the Department in a timely manner and such information was used in the Preliminary Determination to support a negative preliminary critical circumstances determination. Moreover, the Fangda Group and Fushun Jinly claim there is no reason to disregard Fushun Jinly's shipment data because these data contain no new factual information. The Fangda Group and Fushun Jinly further claim that Fushun Jinly's submission of company-specific export data meets all the necessary requirements of 19 U.S.C. § 1677m(e) and may still be used in the critical circumstances determination.

Further, the Fangda Group and Fushun Jinly contest petitioners' assertion that, as AFA, the Department should find that critical circumstances exist for the Fangda Group because the Fangda Group incorrectly provided shipment data based on invoice data in connection with the

Department's critical circumstances analysis. The Fangda Group and Fushun Jinly claim that having reported monthly exports by invoice date, rather than shipment date, should not impact the Department's determination because (1) each month's data was reported on the basis of invoice date and, therefore, allowed for a valid comparison of pre- and post-petition export volume; and (2) the Fangda Group did not benefit by reporting export data on the basis of invoice date rather than shipment date. Furthermore, they argue that even if application of AFA is necessary with respect to export volume under 19 U.S.C. § 1673b(e)(1)(B) due to the Fangda Group's failure to report monthly export volume on a shipment date basis, the application of FA should only apply with respect to the volume criterion under that provision. The Fangda Group and Fushun Jinly further claim that this should not impact the Department's statutory determination under 19 U.S.C. § 1673b(e)(1)(A) because the two statutory provisions are separate and, therefore, the need to resort to FA under one provision does not require that FA should be applied under the other provision. Consequently, according to the Fangda Group and Fushun Jinly, the Fangda Group should be subject to an affirmative critical circumstances determination only if the two statutory criteria are met; the imputation of knowledge and a finding of massive import volume.

Finally, the Fangda Group and Fushun Jinly reject petitioners' suggestion that the Department find massive imports for both companies based on U.S. import volumes reported under HTS item 8545.11.00.00. They argue that under no circumstances should the Department rely upon U.S. import statistics for HTS item 8545.11.00.00 in its analysis because the U.S. import statistics under this provision include both large diameter electrodes and connecting pins and, therefore, are not representative of imports of the subject merchandise.

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

We agree with petitioners. Section 733(e)(1) of the Act provides that, upon receipt of a timely allegation of critical circumstances, the Department will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (B) there have been massive imports of the subject merchandise over a relatively short period.

With respect to the first prong of section 733(e)(1) of the Act, the Department applied the test available under section 733(e)(1)(A)(ii) of the Act. In our Preliminary Critical Circumstances Memorandum, we determined that preliminary dumping margins in excess of 25 percent and the ITC's preliminary determination of material injury were sufficient to impute knowledge of dumping and the likelihood of resultant material injury. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration from Abdelali Elouaradia, Director, Office 4, "Preliminary Affirmative Determination of Critical Circumstances," dated August 14, 2008, (Preliminary Critical Circumstances Memorandum); see also Preliminary Determination at 73 FR 49411. For this final determination, the assigned dumping margins for all interested parties range from 132.90 percent to 159.64 percent, respectively. Since the final dumping margins are greater than 25 percent, these margins similarly provide a sufficient basis for imputing

knowledge of sales of subject merchandise at LTFV to the importers, in accordance with section 733(e)(1)(A)(ii) of the Act.

With respect to the second prong of section 733(e)(1) of the Act, the Department looks to whether, pursuant to section 733(e)(1)(B) of the Act, there have been massive imports of subject merchandise over a relatively short period. As noted above, the Department did not conduct its scheduled verification of Fushun Jinly and, as total AFA, has decided to treat Fushun Jinly as part of the PRC-wide entity. See Comment 1 for further discussion of the Department's application of total AFA to Fushun Jinly. Thus, the Department's determination of whether imports were massive with respect to the PRC-wide entity applies to Fushun Jinly (see discussion in the next paragraph). The Department has also determined to apply total AFA to the Fangda Group. See Comment 3 for further discussion of the Department's application of AFA to the Fangda Group. As explained under Comment 3, we have found, as AFA, that imports were massive with respect to the Fangda Group.

Pursuant to 19 CFR § 351.206(h), the Department will not consider imports to be massive unless imports during the relatively short period (*i.e.*, the comparison period) have increased by at least 15 percent over imports in an immediately preceding period of comparable duration (*i.e.*, the base period). In the Preliminary Determination, the Department examined whether imports were massive with respect to the PRC-wide entity by comparing the volume of graphite electrodes imported from the PRC during the periods February 2008 through June 2008 and September 2007 through January 2008. We used import data from the ITC's DataWeb in our comparison, adjusted to exclude shipment volumes reported by Fushun Jinly and the Fangda Group. Our comparison showed that imports did not increase by at least 15 percent and thus we did not find massive imports with respect to the PRC-wide entity. In this final determination, consistent with our practice, we have examined whether imports were massive with respect to the PRC-wide entity using the longest period for which information is available from the month the petition was filed through the date of the preliminary determination.<sup>38</sup> Specifically, we compared the volume of imports of graphite electrodes from the PRC reported by the ITC's DataWeb for the periods February 2008 through July 2008 and August 2007 through January 2008. We did not reduce the ITC's DataWeb import volumes by shipment volumes reported by Fushun Jinly and the Fangda Group because, as discussed above, the shipment data submitted by Fushun Jinly were not verified and the data submitted by the Fangda Group could not be verified. Thus, these shipment data are no longer reliable for purposes of our final critical circumstances analysis. The unadjusted ITC data show that the volume of imports during the period February 2008 through July 2008 increased by 19.30 percent over the volume of imports during the period August 2007 through January 2008.<sup>39</sup> Given that the increase in imports exceeds 15 percent, we find that imports from the PRC-wide entity were massive.

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<sup>38</sup> See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 68 FR 66800, 66809 (November 28, 2003), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 (April 16, 2004).

<sup>39</sup> See memorandum to the File from Drew Jackson, International Trade Compliance Analyst, Office 4, regarding "Critical Circumstances Calculation," dated concurrently with this memorandum.

In our Preliminary Critical Circumstances Memorandum, the Department used the volume of shipments submitted by Fushun Jinly and the Fangda Group to make its preliminary finding that imports were massive for the separate rate companies. See Preliminary Critical Circumstances Memorandum, at 4-6; see also Preliminary Determination at 73 FR 49411. However, as noted above, the shipment data submitted by Fushun Jinly were not verified, and the Fangda Group's shipment data were not reported on the basis of shipment date as required by the Department, and, consequently, could not be verified. Therefore, these data are no longer reliable for purposes of our final critical circumstances analysis. In the absence of reliable producer data, we have relied upon the unadjusted ITC data described above to determine whether critical circumstances exist for the separate rate companies. Accordingly, we find that the separate rate companies' imports were massive.

Thus, pursuant to section 733(e)(1)(B) of the Act and 19 CFR § 351.206(h), imports were massive for the Fangda Group, the PRC-wide entity and the separate rate companies. In light of the foregoing considerations, the Department finds that critical circumstances exist for the Fangda Group, the separate rate applicants, and the PRC-wide entity, including Fushun Jinly.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination of this investigation and the final weighted-average dumping margin for the investigated firms in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration

\_\_\_\_\_  
(Date)