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Investigation
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February 23, 2007

MEMORANDUM TO: David Spooner
Assistant Secretary
for Import Administration

FROM: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China

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SUMMARY:

We have analyzed the briefs and rebuttal briefs of interested parties in the investigation of certain activated carbon from the People's Republic of China ("PRC"). As a result of our analysis, we have made certain changes from the *Preliminary Determination*. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Activated Carbon From the People's Republic of China*, 71 FR 59721 (October 11, 2006) ("*Preliminary Determination*"). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation:

Changes from the Preliminary Determination

General Issues

Company-Specific Issues

Jacobi Carbons AB ("Jacobi AB"), Tianjin Jacobi International Trading Co., Ltd. ("Jacobi Tianjin"), and Jacobi Carbons, Inc. ("Jacobi US") (collectively, "Jacobi") Issues:

Comment 7:	Whether to Apply Total Adverse Facts Available to Jacobi
Comment 8:	Treatment of Powdered Activated Carbon Sold to the United States
Comment 9:	Whether to Recalculate Jacobi's FOPs to Include By-products in the Denominator
Comment 10:	Whether to Apply Adverse Facts Available for DTFH
Comment 11:	Whether to Apply Adverse Facts Available to Jacobi's Electricity and Labor
Comment 12:	Treatment of Impregnated Material at NXGH for which No Data Were Reported
Comment 13:	Whether to Impute Verification Findings of NXGH and DTHB to Jacobi's Other Suppliers
Comment 14:	Treatment of Water
Comment 15:	Treatment of Packing and Factory Labor
Comment 16:	Valuation of Carbonized Material
Comment 17:	Valuation of Coal
Comment 18:	Valuation of Chemical Inputs
Comment 19:	Calculation of Indirect Selling Expense

Calgon Carbon Tianjin Co., Ltd. ("CCT") Issues:

Comment 20:	Whether to Continue to Apply Adverse Facts Available to Certain CCT Suppliers
Comment 21:	PXZ's Pressroom Product
Comment 22:	Whether to Impute the Verification Findings of NXGH to CCT
Comment 23:	Production Denominator
Comment 24:	Calculation of Indirect Selling Expense
Comment 25:	U.S. Warehousing Expense
Comment 26:	Marine Insurance

Jilin Bright Future Industry and Commerce Company, Ltd. ("JBF Industry") and Jilin Bright Future Chemicals Co., Ltd. ("JBF Chemical") (collectively "Jilin Bright Future") Issues:

Comment 27:	Whether to Apply Adverse Facts Available to Jilin Bright Future

Background

We published the preliminary determination of sales at less than fair value in the *Federal Register* on October 11, 2006. *See Preliminary Determination.* The period of investigation ("POI") is July 1, 2005, through December 31, 2005. We received a case brief from Carbochem Inc. ("Carbochem"), a company that requested a scope exclusion in this investigation (*See Preliminary Determination*), on January 11, 2007. We received case briefs from respondents

Jacobi and CCT on January 16, 2007. We also received a case brief from Calgon Carbon Corporation and Norit Americas Inc. ("Petitioners"), on January 12, 2007. We received rebuttal briefs on January 22, 2007, from: Jacobi, CCT, Jilin Bright Future, and Petitioners.

DISCUSSION OF THE ISSUES:

Changes from the Preliminary Determination

Based on the discussions below, we have made revisions to the data used for the final determination. For further details, *see* Memorandum to the File from Anya L. Naschak: Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc. Program Analysis for the Final Determination ("Jacobi Final Analysis Memo"); and Memorandum to the File from Catherine Bertrand: Calgon Carbon Tianjin Co., Ltd. Program Analysis for the Final Determination ("CCT Final Analysis Memo"), each dated February 23, 2007, which are on file in Import Administration's Central Records Unit, room B-099 of the Department of Commerce building.

General Issues

Comment 1: Whether to Clarify the Scope With Respect to Blended Products

Petitioners argue that the Department should clarify the scope of the proceeding to make clear that the scope exclusion for entries of blended subject merchandise that consist of 50 percent or less steam activated carbon and 50 percent or more of chemically activated carbon is limited to blends of steam activated and chemically activated carbon only. Petitioners claim that blending steam activated carbon with any other substance, whether it be crushed coal, powdered coal, soil, or any other substance, does not remove the merchandise from the scope of any order that may be issued in this proceeding.

Petitioners argue that this exclusion language applies only to mixtures of steam and chemically activated carbons and that mixtures of steam activated carbon with any other materials (coal or coal dust, soil, charcoal, etc.) are not subject to the same exclusion language, and such mixtures are not excluded from the scope of the investigation or any resulting order.

Respondents did not comment on this issue.

Department's Position: In order to ensure compliance with an antidumping duty order, and to prevent circumvention it is incumbent on the Department that scope language is clear and free from ambiguity. We agree with Petitioners that the scope should be revised to specify that the exclusion language regarding blended material applies only to mixtures of steam and chemically activated carbons. We have revised the scope for this final determination to include language regarding this clarification.

Comment 2: Whether to Exclude Carbochem Products from the Scope

Carbochem disagrees with the Department's preliminarily decision that Carbochem's activated carbon is the "same class and kind" of product produced by Petitioners. Carbochem argues that the Department did not properly analyze the legal and factual basis for this conclusion. Carbochem asserts that the Department should have used the "Diversified Products" factors when making a "class and kind" determination.

Carbochem argues that pelletized activated carbon is not even produced in the United States and, therefore, could not have had any impact on any injury suffered by Petitioners. Carbochem argues that Petitioners import pelletized activated carbon and that Petitioners' argument that they can produce this product has no merit as all production of pelletized certain activated carbon in the United States was discontinued long before pricing of Chinese certain activated carbon had any impact on the market conditions.

Carbochem further maintains that the quantity of pelletized certain activated carbon produced in the United States is insignificant in terms of the total quantity of certain activated carbon that is sold. Carbochem argues that the quality of pelletized certain activated carbon produced in the United States was inferior to imported pelletized certain activated carbon. Therefore, Carbochem argues the domestically produced palletized certain activated carbon was not accepted by domestic customers, forcing the domestic industry to import it. Carbochem argues that pelletized certain activated carbon should not be included in the scope for the same reason chemically activated carbon was not included in the scope, namely because the domestic industry no longer produces it. Carbochem asserts that the Department has made no attempt to investigate whether Petitioners are even capable of producing the grades of certain activated carbon that are not currently available in the United States.

Carbochem asks the Department to analyze its scope request using the Diversified Products criteria and to conclude that the products it produces are not the same class and kind as those which Petitioners have included in the scope of this investigation. Carbochem contends that when the Diversified Products factors are applied it is clear that Carbochem's products are not of the same "class or kind" as those covered by the petition. Carbochem asks that the Department exclude specific Carbochem® CAC products from the present investigation because they are: 1) not the "same class and kind" as those produced by the Petitioners; 2) not manufactured in the United States; and/or 3) there is no competing product manufactured in the United States.

Petitioners argue that the Department should not exclude from the scope of the investigation any of the products listed by Carbochem in its case brief. Petitioners assert that Carbochem's argument that the products in question are outside of the class or kind or merchandise covered by the investigation was raised too late as it was first raised in the case briefs, which was after the date fixed by the Department to raise such arguments.

Petitioners argue that there is no question from the record that the scope as written currently includes all of the steam activated carbon products for which Carbochem seeks exclusion. Petitioners maintain that the scope of this investigation covers all forms of activated carbon that are activated by steam or CO2, regardless of the raw material, grade, mixture, additives, further

washing or post-activation chemical treatment (chemical or water washing, chemical impregnation or other treatment), or product form and unless specifically excluded, the scope of this investigation covers all physical forms of certain activated carbon, including powdered activated carbon ("PAC"), granular activated carbon ("GAC"), and pelletized activated carbon. Petitioners assert that no characteristics listed by Carbochem for its products would place them outside the written description of this scope and that none of its products fall within the exclusions listed in the scope for chemically activated or reactivated carbon.

Petitioners contend that Carbochem's request to apply the Diversified Products criteria to the scope determination in this case is misplaced because when the products in question are within the plain language of the scope, application of the Diversified Products criteria is not necessary. Petitioners allege that the factual record is now closed and the Department would need to develop new facts and to engage in a completely new margin analysis for the alleged different class or kind of products if the Department were to exclude certain palletized activated carbon. Petitioners argue that if there is more than one class or kind of merchandise in an investigation, the Department must calculate separate margins for each class or kind and to reach a conclusion that separate classes or kinds of information exist, the Department would have had to undertake additional analysis. Petitioners contend that, because this argument was not raised earlier, Petitioners and the Department were prevented from developing the record sufficiently to examine this issue fully.

Petitioners argue that this test is not appropriate because Carbochem has not asked to have the scope of the investigation split into more than one class or kind of merchandise. Petitioners assert that the Diversified Products criteria are not applied for scope exclusions in this manner and that in order to determine whether products are within the scope of the order, the Department first looks to the written description contained in the scope itself.

Petitioners further contend that there are no clear dividing lines between Carbochem's suggested exclusions and the remaining in-scope products. Petitioners maintain that the Antidumping Manual notes that there must be clear dividing lines for the Department to find different classes or kinds. Petitioners maintain that a review of the descriptions of the products that Carbochem seeks to exclude shows that there is no clear dividing line between the products it lists and other in-scope products. Petitioners argue that Carbochem itself states that there are many different types of steam activated carbons for many different applications which demonstrates that there is no clear dividing line between grades and types of steam activated carbons.

Petitioners argue that even if the Department were to apply the criteria proposed by Carbochem, it would not result in a different outcome than that reached in the *Preliminary Determination* as the general characteristics of the merchandise are the same, there are no bright lines concerning the expectations of the customers as to Carbochem's products, there is no demonstrated difference in channels of trade and the ultimate use of the products is the same, and there is no demonstrated difference in advertising.

Department's Position:

The Department disagrees with Carbochem that we should have applied the "diversified products criteria" in this instance. These criteria, which are set forth in 19 CFR 351.225(k)(2) of the Department's regulations, are used when issues arise as to whether a particular product is included within the scope of an antidumping or countervailing duty order or a suspended investigation. Further, the criteria are only used when the description of the merchandise in the scope, pursuant to 19 CFR 351.225(k)(1), is not dispositive; in those cases, the Department will consider the five additional factors set forth at 19 CFR 351.225(k)(2).

The Department finds the scope language in the *Initiation of Antidumping Duty Investigation: Certain Activated Carbon From the People's Republic of China*, 71 FR 16757 (April 4, 2006) ("*Initiation Notice*") and the *Preliminary Determination* to be clear in that all steam activated carbon is included in the scope. The scope language states "The scope of this investigation covers all forms of activated carbon that are activated by steam or CO_2, regardless of the raw material, grade, mixture, additives, further washing or post-activation chemical treatment (chemical or water washing, chemical impregnation or other treatment), or product form." This description includes all forms of steam activated carbon. The products Carbochem seeks to exclude are steam activated carbon; thus, these products are included in the scope. Because the scope language is dispositive, it is unnecessary to analyze the five additional factors set forth at 19 CFR 351.225(k)(2) as those are reserved for cases where the scope description is not dispositive. Therefore, the Department finds that the products Carbochem seeks to exclude are within the scope of this investigation.

Comment 3: Whether to Correct Freight Ministerial Error

Petitioners argue that the Department should correct a significant ministerial error in its calculation of freight rates that affects all respondents. Petitioners assert that in the *Preliminary Determination*, the Department calculated surrogate truck freight rates by summing two different columns, the first representing freight rates (*i.e.*, charges for a given route, such as "Ahmedabad to Bangalore" quoted at Rs. 20,500 for shipping one truckload 1,514 km.) and the second representing total distance in kilometers applicable to each rate. Petitioners argue that the sum of the rates was then divided by the sum of the distances to arrive at an average per-kilometer freight rate of Rs. 6.03 per full truckload, and a rate of Rs. 0.00067 per kilogram based on a full truckload weight of 9,000 Kg. Petitioners argue that this methodology was erroneous, however, because many of the individual line items listed the rate, distance or both as "N.A.", meaning that certain entries had positive "distances" but were effectively being assigned a "rate" of zero. Petitioners maintain that the correction of this error to ignore line items with incomplete data results in a revised average per-kilometer freight rate of Rs. 0.00126 per kilogram.

Respondents did not comment on this issue.

Department's Position:

We agree with Petitioners that the Department incorrectly calculated truck freight in the *Preliminary Determination* by including "N.A." values for either the rate or distance field when

no corresponding value was reported for the other. Therefore, the Department has recalculated truck freight for the final determination by setting both the rate and distance to "N.A." for all observations where either the rate or distance is equal to "N.A.," thereby calculating truck freight using only those line items where both a distance and freight rate appear. *See* Jacobi Final Analysis Memo and CCT Final Analysis Memo.

Comment 4: Whether to Change the Department's Zeroing Methodology

Petitioners argue that the Department should continue to apply its longstanding dumping calculation methodology with regard to zeroing in this investigation. Petitioners contend that in its March 6, 2006, *Federal Register* Notice, the Department explicitly announced that it would only implement any changes to its zeroing methodology in proceedings initiated after publication of a final decision concerning this matter. Petitioners argue that in its December 26, 2006, letter the Department changed its position with respect to when it would implement the new policy. Petitioners contend that implementing a new methodology in this proceeding is highly prejudicial to Petitioners because they have been denied the opportunity to make a timely allegation of targeted dumping in the proceeding. Petitioners also contend that the Department should reconsider its determination to implement the relevant World Trade Organization ("WTO") Appellate Body Decision on zeroing, because it believes that decision is erroneous. Petitioners assert that the zeroing methodology is consistent with U.S. law, and the WTO's ruling is an improper exercise in appellate legislation that is disfavored by the Congress, and that any change in U.S. law must come from the Congress.

Petitioners argue that an agency should not impose retroactively a new requirement when doing so "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already past." *See Princess Cruises, Inc*., 397 F.3d 1358,1362 (Fed. Cir. 2005) ("*Princess Cruises*"), quoting *Landgraf v. USI Film Prods*., 511 U.S. 244, 269-70 (1994) ("*Landgraf*"). Petitioners assert that in *Landgraf*, the Court set out a three-prong approach to determine whether a rule should be allowed to have retroactive effect and the Court will consider (1) "the nature and extent of the change of the law," (2) "the degree of connection between the operation of the new rule and a relevant past event;" and (3) "familiar considerations of fair notice, reasonable reliance, and settled expectations." *See Landgraf*, 511 U.S. at 270; *see also Princess Cruises*, 397 F. 3d at 1364.

Petitioners summarize this three-part test to state that there is a general presumption against the retroactive application of a new policy that significantly changes an agency's practice, particularly when retroactivity is not authorized by statute, when it increases a party's liability for past actions, and when it violates basic principles of fair notice, reasonable reliance and settled expectations.

Petitioners argue that had they been aware that the Department intended to change its policy or that it was potentially considering retroactive application, Petitioners would have raised different arguments during the course of this investigation. Petitioners contend that the Department specifically informed parties that it would only apply any new policy to new petitions.

Petitioners argue that under the Department's regulations, Petitioners were required to make any targeted dumping allegation 30 days before the *Preliminary Determination*. *See* 19 C.F.R. § 351.301(d)(5). However, Petitioners maintain that they had no compelling reason to make the allegation while the Department was employing zeroing because respondents could not benefit from targeted dumping when zeroing is employed.

Petitioners argue that Jacobi was engaging in targeted dumping during specific time periods and specific months. Petitioners stated that they analyzed the degree to which subject merchandise was found to be dumped by month and Petitioners used, as a starting point, the Department's preliminary calculation for Jacobi, using the sales and factors submitted by respondent. Petitioners also argue that Jacobi target dumped by quarter and that Petitioners also analyzed the degree to which subject merchandise was found to be dumped by quarter by starting with the Department's preliminary calculation for Jacobi and the sales and factors submitted by the respondent. Petitioners also assert that there is evidence of geographic targeted dumping by region and regional division and that Petitioners also analyzed the degree to which subject merchandise was found to be dumped by region and/or geographic division, using as a starting point the Department's preliminary calculation for Jacobi and the sales and factors submitted by respondent. Petitioners state that they used the zip codes in Jacobi's geographic destination (DESTU) field and were able to match the state of each sale and thus group the U.S. sales by major geographic region or regional division

Further, Petitioners argue that record evidence shows that Jacobi not only targeted a major region, but also targeted a specific regional division therein. Petitioners contend that in conducting this regional dumping analysis, they assigned nine regional divisions in the United States: Mountain, Pacific, West North Central, East North Central, West South Central, East South Central, South Atlantic, Middle Atlantic and New England and that the result of the regional division analysis demonstrates regional targeted dumping.

Petitioners argue that they also analyzed the degree to which subject merchandise was found to be dumped by customer by using the Department's preliminary calculation for Jacobi and the sales and factors submitted by Jacobi. Petitioners argue that data demonstrate that Jacobi used profitable sales to certain customers to leverage dumped sales to other customers.

Petitioners urge the Department to reconsider its decision to implement the erroneous WTO Appellate Body decisions because the WTO Appellate Body decisions assert that zeroing is inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1, 9.3, 9.5, 11, 18.3 and 18.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article XVI:4 of the WTO Agreement.

Petitioners argue that the Department's current policy properly aggregates all the individual dumping margins and divides this amount by the value of all sales, which includes the "non-dumped" transactions, so that all sales, whether found to be dumped or not, are included in the Department's calculation to establish a weighted-average dumping margin. Petitioners maintain that any change to the Department's zeroing policy should be based on changes to the law that are enacted by Congress, given that Congress, not the Administration, is the legislative branch of

the U.S. government and any deviation from this practice would violate current U.S. law. Petitioners state that the Department should not implement this new policy in current ongoing investigations or in future investigations and that the new policy will specifically violate current U.S. law and is the result of severe overreaching by the WTO Appellate Body.

Jacobi argues that the Department should follow the recent final modification of its methodology regarding the use of zeroing in antidumping investigations in the final determination. Jacobi argues that the December 27, 2006, notice that the Department published stated it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons and would apply to all investigations pending before the Department as of the effective date. Jacobi contends that, because the Department's investigation of certain activated carbon from the People's Republic of China was pending before the Department, the Department should apply this new practice to calculating margins in the final determination.

Jacobi maintains that applying the modification to pending investigations will not require the Department to gather any new information in the proceeding and that it is in the public interest for the Department to ensure that its practices conform with the United States' commitments as a member of the WTO.

Jacobi asserts that Petitioners will not be prejudiced by the Department's application of the final modification in this proceeding because all of the current investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed modification. Jacobi argues that Petitioners have been provided ample opportunity to comment on this change in methodology in this investigation and the Department should implement this modification in the final determination of this investigation and calculate Jacobi's margin by providing offsets for all non-dumped comparisons.

Department's Position:

We determine that it is appropriate to apply the methodology described in the December 27, 2006, *Federal Register* Notice to this investigation. We disagree with Petitioners' argument that the Department cannot apply its new methodology to investigations pending as of February 22, 2007. Petitioners rely heavily on the Department's statements in its March 6, 2006, *Federal Register* Notice that it intended to apply the modification to new investigations initiated on or after the effective date of the *Final Modification*. Section 123(g)(1)(c) of the Uruguay Round Agreements Act ("URAA"), however, provides that prior to implementing a WTO report finding "a regulation or practice of a department or agency of the United States is inconsistent with any Uruguay Round agreement," the Department will "provide an opportunity for public comment by publishing in the *Federal Register* the proposed modification and the explanation for the modification." *See* section 123(g)(1)(c) of the URAA (19 U.S.C. 3533(g)(1)(c)). Consequently, on March 6, 2006, in response to the WTO dispute settlement panel report in *United States-Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing*") (WT/DS294)("*US Zeroing (EC)*"), the Department published a notice in the *Federal Register* proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons, and requesting comments on the

proposal. The March 6, 2006, *Federal Register* Notice was not a final announcement of the Department's final modification.

As the Department explained in its December 27, 2006, *Federal Register* Notice, section 123 of the URAA states that a final modification cannot go into effect before the end of the 60-day period after the consultations described in section 123(g)(1)(E) begin, unless the President determines that an earlier effective date is in the national interest. *See* section 123(g)(1)(c) of the URAA (19 U.S.C. 3533(g)(1)(c)). However, section 123 of the URAA does not specify whether final modifications must apply only to new segments of proceedings initiated after the effective date. Nor does the *Statement of Administrative Action* ("SAA") provide more specific guidance on this issue. *See* SAA accompanying the URAA, H.R. Doc 103-316, Vol.1, 103d Cong. at 1021 (1994). By contrast, section 129 of the URAA provides that any new determination made under section 129 to implement a WTO report applies to entries made on or after the date on which USTR instructs Commerce to implement the new determination. *See* section 129(c)(1) of the URAA (19 U.S.C. 3538(c)(1)). As the Department previously noted, section 123 of the URAA uses the term "go into effect," which does not preclude applying a modification in an ongoing proceeding, even if it effects entries made prior to the announcement of that change. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69196 (November 15, 2002). Indeed, the Department has on occasion adopted a change in statutory interpretation that applied to all segments pending as of the date of the change. *See, e.g., Basis for Normal Value When Foreign Market Sales Are Below Cost*, Policy Bulletin 98.1 (February 23, 1998); *Treatment of Inventory Carrying Cost in Constructed Value*, Policy Bulletin 94.1 (March 25, 1994). Accordingly, the Department has the authority to apply a new statutory interpretation to pending investigations.

In this regard, the U.S. Court of Appeals for the Federal Circuit has held that where the Department has the authority to interpret the statute, the Department may occasionally reassess its policies, and apply a new policy to a pending case. *See SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029-30 (Fed. Cir. 2001). Here, the Federal Circuit has repeatedly held that the Department's treatment of non-dumped sales is not required by statute, but is instead a result of the Department's interpretation of the statute. *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334, 1341-42. As the Federal Circuit has also repeatedly held, the Department may reasonably change its interpretation of the statute at any time, so long as it provides an explanation for that change. *See NTN Bearing Corp. of America v. United States*, 295 F.3d 1263, 1269 (Fed. Cir. 2002); *British Steel, PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997). The reasons for the Department's change are well explained in the December 27, 2006, notice and the Department continues to stand by those reasons.

Moreover, this is not an unlawful retroactive application of a new rule. A rule does not operate retroactively merely because it is applied to conduct occurring before the rule's existence, or it upsets expectations based on a prior rule. *See Landgraf* 511 U.S. at 269. Rather, to have retroactive effect, the rule must impair the rights a party possessed when it acted, increase liability for past conduct, or impose new duties or sanctions with respect to transactions that have already occurred. *Id*. at 280.

First, the application of the Department's *Final Modification* does not impair any rights Petitioners possessed at the time of the filing of the petition. As stated above, the Department's treatment of non-dumped sales was not a statutory requirement, but a result of the Department's interpretation of the statute. Because the Department could reasonably change its interpretation of the statute, Petitioners cannot be said to have any right to have the weighted-average dumping margin calculated without the provision of offsets.

Second, the Department's change in statutory interpretation does not increase any party's liability for past conduct. Finally, the change in statutory interpretation does not impose any new duties or sanctions on past transactions. Accordingly, the application of the *Final Modification* to this investigation is not an impermissible retroactive application of a new rule.

We also disagree with Petitioners' argument that they are prejudiced because, had they been aware that the Department intended to apply the new methodology to this proceeding, Petitioners would have raised different arguments during the course of this investigation, including a timely allegation of targeted dumping under section 777A(d)(1)(B) of the Tariff Act of 1930, as amended ("the Act"). With regard to a targeted dumping allegation, we note that section 777A(d)(1)(B) of the Act is an independent provision of the antidumping law, unrelated to the Department's modification of its methodology of calculating weighted-average dumping margins. Indeed, Petitioners were in no way prevented from making a targeted dumping allegation in a timely manner, even if they believed the Department's modified methodology would not apply to pending investigations. The Department's regulations state that an allegation of targeted dumping must be made "no later than 30 days before the scheduled date of the preliminary determination." *See* 19 C.F.R. 351.301(d)(5). Thus, as Petitioners concede, this deadline has passed and Petitioners are precluded from making a targeted dumping allegation. Therefore, the Department will not consider evidence related to an untimely allegation of targeted dumping. Because Petitioners were not prevented from making a timely allegation of targeted dumping, but rather chose not to make such an allegation, the *Final Modification* is not prejudicial.

With regard to Petitioners' comments on the correctness of the panel's report in *US Zeroing (EC)*, the issue before the Department relates to the application of U.S. law, not whether the panel correctly interpreted the WTO Antidumping Agreement. Hence, for the reasons stated above, we determine that it is proper under US law to apply the Department's *Final Modification* to this investigation.

Comment 5: Whether to Grant a By-Product Offset for Activated Carbon Products

CCT argues that the Department erred in its treatment of by-products in the *Preliminary Determination*. CCT contends that the Department denied CCT's requested by-product credit for activated carbon powder, fines and floating fines, and dust as well as for pressroom product powder, based on its findings that powder, fines and floating fines, and dust are subject merchandise and that pressroom product could not be quantified.

CCT stated that it reported that certain of its suppliers generated by-products comprised of activated carbon powder, fines, floating fines, and dust at various stages of the production process that were either sold or reused in the production process. CCT maintains that it originally reported its FOP data treating such materials as by-products, for which CCT requested a by-product credit. CCT holds that for purposes of the *Preliminary Determination*, the Department denied the requested by-product credit because the activated carbon powder, fines and floating fines, and dust are subject merchandise and, therefore, cannot be considered by-products. CCT argues that it reported the by-product pressroom product powder and the Department preliminarily determined to deny a by-product credit for this input as it was unclear how much was reused in the production process.

CCT disagrees that materials such as carbon powder, fines and floating fines, and dust that are generated in the production process may not be considered "by-products" for cost reporting purposes simply because these materials happen to be within the scope of the products under investigation. CCT argues that the National Association of Accountants ("NAA") defines a "by-product" as a secondary product recovered in the course of manufacturing a primary product, whose total sales value is relatively minor in comparison with the sales value of the primary product(s). *See Management Accountants' Handbook*, *4th Ed.* (Keller, Bulloch and Shultis) at 11.6. CCT asserts that in this case, the Department directly verified that the materials at issue are recovered in the course of manufacturing a primary product and their value is relatively minor in comparison with the sales value of the primary product.

CCT contends that these materials were not intended to be produced, and CCT normally reintroduces these by-product materials into the production process. CCT further states that these materials are also recorded and tracked as by-products in the ordinary course of business in the company's production and cost accounting records. CCT claims that because these are by-products that are reintroduced into the production process or sold, CCT should be entitled to a by-product credit in accordance with established Department practice. *See, e.g., Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China*, 66 FR 49,632 (September 28, 2001). Further, CCT states that there is also a reported quantity of CCT pressroom by-product, which is indisputably a by-product and for which a by-product credit is clearly warranted.

Jacobi argues in its case brief that the Department should grant a by-product offset for the suppliers that reported by-products.

With respect to Jacobi, Petitioners argue in their case brief that semi-finished PAC, reported by Jacobi's suppliers Datong Huibao Active Carbon Co., Ltd. ("DTHB"), Datong Forward Activated Carbon Co., Ltd. ("DTFH"), Datong Hongtai Activated Carbon Co., Ltd. ("DTHT"), and Ningxia Huahui Activated Carbon Company Limited ("NXHH"), is not a separate class of product from activated carbon. Petitioners argue that the verification reports of Jacobi's suppliers do not clarify how the product is distinct from subject merchandise or "semi-finished." Petitioners also assert that even were the PAC to be post-sieving stage activated carbon in irregular powder sizes, the product is still subject merchandise and more properly considered a co-product than a by-product, and should not be used to offset production costs.

Petitioners further argue that DTFH collects its reported by-product through various methods in order to recycle the by-product. *See* Jacobi's Supplemental A, C, and D response, dated August 23, 2006, ("Jacobi Supp") at 72. Petitioners contend that these by-products are granules or fines too small to be granulated activated carbon and too large to be PAC. Petitioners argue that if they are re-introduced into the production process they are inputs and if they are sold they are further milled to be sold as PAC, and, therefore, Petitioners argue, are fully activated carbon and not scrap. Petitioners allege that for DTFH, the reported by-product should be incorporated into Jacobi's margin calculation as a positive input of fines, included in the calculation of direct materials, and valued using HTS 2714.10, bituminous granules from Indian Import Statistics. *See* Petitioners' August 10, 2006, submission at 32-33.

Petitioners note that NXHH stated it collects by-products through sieving or manual collection, and that all carbonization inputs were reused. Petitioners argue that it is unclear what material (*i.e.*, carbonization or activation by-products) is collected and reused. *See* Jacobi Supp at 82-84. Petitioners argue that some of these by-products are charcoal (*i.e.*, prior to activation). *Id.* at 85-86 and Exhibit Q#47. Petitioners argue that the acid wash by-product NXHH indicates that it sold to unaffiliated customers is subject merchandise, and, therefore, Petitioners contend, NXHH should not be granted an offset for this by-product. *Id.* at Exhibit Q#128. Petitioners also assert that the sieving by-product reported by NXHH are granules or fines too small to be granulated activated carbon and too large to be PAC. Petitioners argue that if this product is sold as fines, it should be valued using HTS 2714.10, bituminous granules from Indian Import Statistics. *See* Petitioner's August 10, 2006, submission at 32-33. However, Petitioners also aver that these products appear to be PAC, subject merchandise, and NXHH should not be granted an offset. Petitioners also argue with respect to the sieving by-product reported by NXHH, that this is PAC and GAC. Petitioners argue that, if these are mixed with other inputs to produce the final product as NXHH states (*see* Jacobi Supp at 83-84), they are inputs and should not be valued. Petitioners argue that no offset should be granted for any of NXHH's by-products because carbonization by-products have not been separately reported, PAC and GAC by-products are subject merchandise, and NXHH has not clarified on the record whether its carbonized material ("CARBMAT") input factors are net or gross of these materials.

Department's Position:

With the exception of CCT's claimed pressroom product by-product, the Department continues to find that the products respondents have claimed as by-products are in fact merchandise within the scope of this investigation because they are still considered activated carbon, and, therefore, should not be considered a by-product. With regard to CCT's pressroom product, the material has not been activated and, therefore, cannot be considered to be subject merchandise. Accordingly, we are granting a by-product credit for CCT's reported pressroom product by-product as there is now record evidence to support the amount of the claimed by-product.

With respect to the other claimed by-products by Jacobi and CCT, we are continuing to deny the by-product offset because we determine that the by-products are merchandise subject to the scope of this investigation. CCT reported that certain suppliers generated activated carbon powder, fines, floating fines, and dust at various stages of the production process that were either sold or reused in the production process and claimed a by-product credit for this material. Jacobi

reported that certain suppliers generated activated carbon powder at various stages of the production process that was either sold or reused in the production process.

It is clear from the language of the scope of this investigation that it includes "...all forms of activated carbon that are activated by steam or CO_2, regardless of the raw material, grade, mixture, additives, further washing or post-activation chemical treatment (chemical or water washing, chemical impregnation or other treatment), or product form..." and "the scope of this investigation covers all physical forms of certain activated carbon." *See Preliminary Determination* 71 FR at 59723. The scope language contains no size or form restrictions on the steam activated carbon. Therefore, we determine that Jacobi and CCT's activated carbon powder and CCT's fines, floating fines, and dust are considered merchandise within the scope of this investigation because all of these materials are steam activated carbon.

In the antidumping duty investigation of hot-rolled carbon steel flat products from the People's Republic of China, we found that recovered defective hot-rolled steel sheet was non-prime merchandise under investigation (*i.e.*, a "second") and therefore denied respondent's claimed by-product offset. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China*, 66 FR 49632 (September 28, 2001). The Court of International Trade ("CIT") upheld the Department's decision not to treat the defective hot-rolled sheet as a by-product because it is merchandise subject to the scope of the investigation. *See Anshan Iron & Steel Co. v. United States*, 358 F. Supp. 2d 1236, 1244 (CIT 2004) ("*Anshan*"). Further, the Court has consistently upheld the Department's prior determinations where the Department treated non-prime materials as subject merchandise rather than a by-product because it is still merchandise subject to the scope of the investigation. *See, e.g., Ipsco, Inc. v. United States*, 714 F.Supp. 1211, 1216 (May 18, 1989).

It is not the Department's practice to grant by-product credit for the merchandise which meets the scope of the investigation, and as we have determined the alleged by-products at issue are within the scope of the investigation, we determine not to grant a by-product credit for Jacobi and CCT's activated carbon powder and CCT's fines, floating fines, and dust.

Comment 6: Treatment of Non-Production Electricity and Labor

Petitioners argue in their case brief that Jacobi's suppliers have improperly reported non-production electricity and labor. With respect to DTHB, Petitioners argue that DTHB improperly excluded electricity related to general factory operations, rather than allocating all electricity to individual products. *See* Jacobi Supp at Exhibit Q#76.b. Petitioners also argue that Ningxia Guanghua Activated Carbon Co., Ltd. ("NXGH") inappropriately excluded testing labor from its reported labor factors of production ("FOPs") and testing electricity from its reported electricity FOPs. *See* Jacobi Supp at 95. Further, Petitioners aver that DTHT has also incorrectly excluded "other operations" electricity from its FOP for electricity. *See* Jacobi Supp at 61. Petitioners argue that DTHT did not support its electricity consumption. Petitioners contend that the response does not explain whether the reported electricity includes non-subject merchandise or non-production electricity. Petitioners argue that any all-factory costs should be included in the electricity FOP. Petitioners also argue that DTFH did not substantiate the removal of "Office Equipment" from its electricity consumption reported to the Department, and

that the reported amount does not contain activation stage electricity. *See* Jacobi's July 10, 2006, response ("Jacobi Section C&D") at Exhibit IV-3; Jacobi Supp at Exhibit Q#52. Petitioners further assert that DTFH's electricity consumption figures are based on an unsubstantiated allocation and it is unclear what electricity DTFH has reported. *See id.* and Jacobi Supp at 71. With respect to NXHH, Petitioners argue that NXHH has also incorrectly removed non-production usage of electricity, and that the methodology used to remove it is also flawed. Petitioners contend that NXHH's reported electricity is based on an unsubstantiated consumption allocation of 20 percent to non-production electricity.

With respect to CCT, Petitioners argue that the Department noted that CCT used an allocation for electricity. Petitioners argue that, whether the Department accepts this allocation or not, the Department should ensure that electricity consumption is treated consistently with the treatment of electricity in its calculation of the surrogate overhead ratio. Petitioners maintain that the Department's current surrogate calculation disregards the surrogate companies' electricity costs based on the assumption that all such costs are direct energy that will be valued elsewhere in the normal value build-up. CCT, Petitioners claim, has in effect elected to report only a certain percentage of its electricity as direct energy. Petitioners argue that if these allocations are accepted then the same percentages of electricity consumed by the surrogate company should also be allocated to overhead. Petitioners further contend that alternatively, the unsupported allocation should be rejected and the entire amount valued as direct energy for purposes of the final normal value calculation.

Petitioners argue that because the surrogate values for sales, general and administrative expenses ("SG&A"), overhead, and profit are calculated with energy and labor costs in the materials labor and energy ("MLE") denominator (*see* Petitioners' August 10, 2006, submission at Exhibit 36), all factory consumption of energy and labor inputs must be reported. Petitioners argue that either all electricity and labor of CCT and Jacobi and CCT's suppliers, irrespective of whether it is directly related to the production process or indirect, should be included in the electricity and labor consumption factors, or the energy and labor in the MLE denominator should be reallocated. Petitioners contend that 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 (Apr. 16, 2004), and accompanying Issues and Decision Memorandum ("*CTVs I&D Memo*") at Comment 19, the Department adjusted the SG&A expenses in the financial ratios based on the respondents' reporting of labor.

CCT argues in its rebuttal brief that, with respect to its electricity allocations, the Department's verification report very clearly describes how CCT demonstrated that these allocation percentages are "maintained in the ordinary course of business," and the Department specifically verified that the sample electricity bill (for November 2005) was allocated to the respective cost centers using these factors maintained in the ordinary course of business. *See* Memorandum to the File: Verification of the Sales and Factors Response of Calgon Carbon Tianjin Co., Ltd. and Calgon Carbon Corporation in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated January 4, 2007, ("CCT Report") at 23. CCT contends that the allocations at issue were demonstrated to reflect factors actually utilized by the company in the ordinary course of business and it is the Department's established practice to

accept cost calculations based on allocations historically utilized by the company in the ordinary course of business. *See, e.g., Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29310 (May 22, 2006) ("*Diamond Sawblades Final*").

CCT argues that it makes no sense for the Department to adjust the surrogate company's overhead ratio by simply adding 50 percent of the surrogate's energy costs to the numerator as Petitioners advocate because doing so would grossly overstate the adjustment because the line item from the surrogate company's income statement for energy costs includes both "Power" and "Fuel" and, therefore, includes more energy sources and costs than just electricity. CCT further maintains that by adjusting the surrogate overhead ratio, the Department runs the risk that this adjusted ratio would be mistakenly applied to the FOPs reported for other Chinese suppliers where Petitioners have not evidenced any similar discrepancy.

CCT notes that no allegation has been made, and no evidence presented, that a similar inconsistency applies to any Chinese suppliers other than CCT. CCT asserts that the Department must, therefore, be careful to limit any adjustment it makes solely to the reported electricity consumption for CCT and must be careful not to inadvertently adjust the electricity consumption reflected in the activated carbon inputs from other Chinese suppliers that were used by CCT in blending finished product.

Department's Position:

We disagree with Petitioners that any adjustment of the surrogate financial ratios or to respondents' reported electricity or labor is appropriate. In addition, we disagree with Petitioners that the application of an adverse inference is appropriate with respect to DTHB, DTHT, DTFH, and NXHH.

In non-market economy ("NME") countries the Department determines "normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise. (emphasis added)" *See* section 773(c)(1)(B)(a) of the Act. Consistent with the Department's regulations, the respondents in this case, Jacobi and CCT, reported the FOPs of labor and electricity necessary to produce the merchandise under investigation, excluding non-production electricity. *See, e.g.*, Jacobi Supp at 52, 61, 82; CCT Verification Report at 23. Therefore, in accordance with section 773(c)(1)(B)(a) of the Act, we find that it is inappropriate to increase Jacobi's and CCT's electricity or labor consumption to include non-production electricity as this electricity is not "utilized in producing the merchandise." *Id*.

In addition, consistent with the Department's recent determination in the *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China*, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 12, the Department has determined that it should not add a factory overhead and SG&A energy amount to normal value for any of its calculations of the respondents' margins, nor attempt to adjust the surrogate financial ratios to remove non-production electricity or labor. Although the surrogate-company ratios may contain energy consumed for factory overhead and

SG&A in the MLE denominator, we do not find that making such an adjustment yields a more accurate result. Indeed, such an adjustment could introduce unintended distortions into the data. Moreover, both the CIT and the Federal Circuit have affirmed that the Department does not generally adjust the surrogate values used in the calculation of factory overhead.[1] In *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247 (CIT 2002) ("*Rhodia*"), the Court confirmed the Department's practice that once the Department establishes that the surrogate produces identical or comparable merchandise, closely approximating the nonmarket producer's experience, Commerce merely uses the surrogate producer's data. *See* section 771(c)(4) of the Act; 19 C. F. R. 351.408(c)(4). Furthermore, the Department is not required to "duplicate the exact production experience of the Chinese manufacturers," (*Nation Ford Chem. Co. v. United States*, 166 F. 3d. 1373, 1377 (Fed. Cir. 1999)), or undergo "an item-by-item analysis in calculating factory overhead." *See Magnesium Corp. of Am. v. United States*, 166 F. 3d. 1364, 1372 (Fed. Cir. 1999). In addition, in *Rhodia* the Court stated that "Commerce need not use "perfectly conforming information," only comparable information. *Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments*, 61 FR 7308, 7344 (Feb. 27, 1996)." *See Rhodia* 240 F. Supp. 2d at 1250-51. Because all labor and electricity are included in "Salaries & Allowances" and "Power and Fuel," any adjustment would be more inaccurate, not less. Accordingly, we have not made the adjustments as urged by Petitioners.

Company Specific Issues

Jacobi:

Comment 7: Whether to Apply Total Adverse Facts Available to Jacobi

Petitioners argue that the Department's inability to verify the quantities of merchandise shipped in and out of Jacobi Tianjin's facility during the POI and whether this merchandise was further processed undermines the accuracy of Jacobi's response. Petitioners also allege that Jacobi's supplier, NXGH, failed verification and that supplier DTHB's data also contain significant errors. Petitioners also argue that Jacobi's U.S. sales database contains numerous errors which require a new U.S. sales database, and the Jacobi AB verification demonstrated that unreported U.S. sales expenses were incurred by Jacobi AB. Petitioners allege that these mistakes and omissions require inappropriate and prejudicial revisions to Jacobi's data. Petitioners argue that the errors in Jacobi's responses are so pervasive as to render the responses unreliable for purposes of the final determination and argue the burden of preparing a complete and accurate record is Jacobi's responsibility, making the application of total adverse facts available ("AFA") to Jacobi's response appropriate. *See China Steel Corp. v. United States*, 306 F. Supp. 2d 1291, 1306 (CIT 2004).

Citing 19 U.S.C. § 1677e(a), Petitioners note that the Department is required to resort to the facts otherwise available if: "(1) necessary information is not available on the record, or (2) an

[1] *See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China*, 61 FR 14057, 14060 (Mar. 29, 1996); *Synthetic Indigo From the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value*, 65 FR 25706, 25706-07 (May 3, 2000); *Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from the People's Republic of China*, 62 FR 51410, 51413, 51417 (Oct. 1, 1997).

interested party or any other person – (A) withholds information that has been requested by the administering authority…(B) fails to provide such information by the deadline for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title, (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title." *See* 19 U.S.C. § 1677e(a). Petitioners further note that section 1677m(d) requires the Department to notify respondents of deficiencies and provide an opportunity to remedy such deficiency to the extent practicable, and that section 1677m(e) requires the Department not to decline to use deficient information where that information is submitted by the established deadline, can be verified, is not so incomplete that is cannot be used as the basis for the required determination, was provided by a party who acted to the best of its ability in providing the information and meeting applicable requirements, and can be used without undue difficulties. Further, Petitioners argue that "section 1677m(e) is, on its face, inapplicable in situations where… a party has failed to "demonstrate{ } that it acted to the best of its ability in providing the information and meeting the requirements established by {Commerce} with respect to the information."[2]

Petitioners argue that the verification outline sent to Jacobi on October 13, 2006 (*see* Letter from Carrie Blozy to Jacobi dated October 13, 2006, ("Jacobi Tianjin Outline"), specifically required Jacobi to "prepare in advance" and have "available on the first day" all schedules, documents, and other materials necessary for the verification. *See* Jacobi Tianjin Outline at 1. Petitioners further argue that Section VI of the outline required Jacobi to have prepared reconciliation worksheets tying the products manufactured by Jacobi's suppliers to the products shipped to United States. *Id*. at 3. Petitioners allege that, despite this requirement, Jacobi did not have this information prepared at the beginning of verification and Jacobi's counsel stated that he "thought all quantity and value reconciliation would take place in the United States." *See* Memorandum to the File: Verification of the Sales and Factors Response of Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc. in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated January 4, 2007, ("Jacobi Tianjin Report") at 7. Petitioners argue that Department officials informed Jacobi officials of the critical nature of these reconciliations and provided Jacobi with the opportunity to present these reconciliations later in the day of the verification, but that Jacobi failed to do so. *Id.* at 7-8. Petitioners further argue that Jacobi Tianjin could have prepared the requested information, as Jacobi Tianjin maintained records on site. *Id*. at 7.

Petitioners argue that Jacobi's failure to provide the requested information after two chances should be considered significantly impeding the investigation and is grounds for application of facts available ("FA"). *See* 19 U.S.C. § 1677e(a)(2)(C). Petitioners further assert that the second chance provided by the Department was not required as it is the Department's policy to not accept new information or substantial revisions of questionnaire responses at verification,[3] but, Petitioners argue, the Department has nevertheless satisfied 19 C.F.R. § 1677m(d) by doing so. *See also Shandong Huarong*, Slip Op. 2003-135 at 14. Petitioners argue that the reconciliation of the quantity and value at Jacobi Tianjin was critical to Jacobi's margin calculation as it is

[2] *Borden v. United States*, 4 F. Supp. 2d 1221, 1245-46 (CIT 1998).
[3] Citing *Shandong Huarong General Group Corp. v. United States*, Slip Op. 2003-135 (CIT 2003) ("*Shandong Huarong*") at 12 and Letter from Carrie Blozy to Jacobi dated October 13, 2006 ("Jacobi Tianjin Outline").

based on which suppliers produced the merchandise sold to the United States. Petitioners allege that if the quantity and value of the shipments from unique suppliers is inaccurate, the weighted-average margin for Jacobi will be incorrect. Therefore, Petitioners argue, Jacobi Tianjin's failure to provide this information undermines the accuracy of Jacobi's overall response and precludes the calculation of an accurate margin. Petitioners argue the failure to provide a verifiable tie between production and sales justifies the application of total AFA. *See* 19 U.S.C. § 1677e(a)(2)(D).

Petitioners also argue that, contrary to Jacobi's statements that the quantity and value of shipments would be reconciled in the United States, Jacobi did not provide such reconciliations in the United States,[4] nor was this reconciliation conducted in Sweden,[5] although the Department was able to verify the quantity and value of individual purchases from each of Jacobi AB's suppliers. *See* Jacobi AB Report at 8. Petitioners argue that the availability of electronic records at Jacobi AB does not validate the missing physical shipment information, nor does it satisfy Jacobi's responsibility to be prepared for verification. Petitioners further argue that the presence of lot numbers that tie all Jacobi documents to each other demonstrates that a reconciliation could have been prepared. Petitioners also argue that the Jacobi AB electronic records (including lot numbers) were not reconciled to Jacobi Tianjin's records, and, therefore, do not demonstrate the link between Jacobi Tianjin and unaffiliated suppliers. Petitioners further assert that Jacobi Tianjin also did not demonstrate its production quantity tied to source documents (*i.e.*, original shipment authorization forms), which demonstrates that Jacobi is impeding the investigation. *See* 19 U.S.C. § 1677e(a)(2)(A) & (C); *see also Shandong Huarong*, Slip Op. 2003-135 at 14. Petitioners argue that Jacobi deliberately withheld the reconciliation link between producer and production quantity and Jacobi has selectively reported other data including factors data for NXGH. Petitioners allege that Jacobi has misused the lot number system to base its reporting on a limited portion of its POI production without the permission of the Department and without demonstrating that this reporting was complete. Therefore, Petitioners contend, the Department should conclude that Jacobi intentionally withheld the reconciliation information, and find that Jacobi's responses are not verified. *See* 19 U.S.C. § 1677e(a)(2)(A).

Petitioners also argue that Jacobi's failure to demonstrate no further processing was conducted at Jacobi Tianjin during the POI significantly impeded the investigation and warrants the application of FA. *See* 19 U.S.C. § 1677e(a)(2)(C). Citing Jacobi Tianjin Report at 1, Petitioners argue that the missing information is critical to determine whether any or all of the merchandise shipped to the United States underwent further processing and hinders the ability of the Department to verify the accuracy of Jacobi's FOP calculations, making Jacobi's FOPs unverifiable. *See* 19 U.S.C. § 1677e(a)(2)(D).

[4] *See* Memorandum to the File: Verification of the Sales Response of Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc. in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated January 4, 2007 ("Jacobi US Report").
[5] *See* Memorandum to the File: Verification of the Sales and Factors Response of Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc. in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated January 5, 2007 ("Jacobi AB Report").

Petitioners argue that if the Department does not apply total AFA to Jacobi, the Department should nevertheless apply partial AFA to Jacobi Tianjin. Petitioners argue that as partial AFA, the Department should infer that all U.S. sales were further processed at Jacobi Tianjin and add an additional cost to direct materials ("DIRMAT") for all products. Petitioners argue that the additional cost should be $13.3380 per kg, the calculated difference between the POI surrogate value of semi-finished activated carbon and finished activated carbon based on the experience of Indo German Carbons. *See* Petitioners' August 10, 2006, Surrogate Value Submission at 25-26.

In addition, Petitioners argue that Jacobi's supplier DTHB failed the verification of its FOP information. Petitioners assert that DTHB has selectively participated in the investigation by failing to cooperate as a respondent while participating as a supplier to Jacobi, making its failure to verify the reported information grounds for the application of FA. Petitioners argue that DTHB did not substantiate the difference between its reconciliation worksheet and the reported value of shipments.[6] Petitioners assert that this discrepancy magnifies the undocumented shipments into Jacobi Tianjin and is further grounds for the application of FA. *See* U.S.C. § 1677e(a)(2)(D). Petitioners further contend that DTHB's lack of preparation for the cost reconciliation and carbonized material verification (*see* Petitioner's Case Brief at 16-17, where Petitioners quote DTHB Report at 10-11, 13) resulted in the Department being unable to complete its verification of the data. *See* DTHB Report at 14-16. Petitioners argue that the burden of preparing a complete and accurate record rests on DTHB[7] and the Department should not allow DTHB or Jacobi to benefit from DTHB's actions at verification. Petitioners contend that a respondent is presumed to be familiar with its own records,[8] but DTHB did not ensure that it was prepared to support its methodology during verification by the Department. Petitioners argue that DTHB failed to put forth its maximum effort to prepare for verification and ensure that its FOPs were verifiable, which, Petitioners assert, constitutes a significant impediment to the investigation and is grounds for the application of FA. *See, e.g.*, *Shandong Huarong*, Slip Op. 2003-135 at 14-15; 19 U.S.C. § 1677e(a)(2)(C).

Petitioners further argue that Jacobi's supplier NXGH also failed verification of its FOP information, as the data contained significant discrepancies and could not be verified. Petitioners argue that NXGH's data are unusable for calculating FOPs for Jacobi. Petitioners further argue, citing NXGH Report at 1, that NXGH did not prepare properly for verification making the FOP and sales-related data from NXGH unverifiable and unusable as a basis for calculating normal value ("NV") for the final determination. *See* 19 U.S.C. § 1677e(a)(2)(D). Petitioners assert that NXGH fabricated records and argue that the Department verified that NXGH alters its books and records with respect to labor and cost of production ("COP"). Petitioners argue that this undermines the veracity of NXGH's books and records, making them unusable. Petitioners contend that because NXGH does not have books and records that are reconcilable to NXGH's reported data, the necessary information is not available on the record and is grounds for resorting to FA pursuant to 19 U.S.C. §§ 1677e(a)(1) and (2)(D).

[6] *See* DTHB Report at 8-9.
[7] *See, e.g., China Steel Corp. v. United States*, 306 F. Supp. 2d 1291, 1306 (CIT 2004) ("*China Steel 2004*").
[8] *See Nippon Steel Corp. v. United States*, 337 F.3d at 1373, 1382-83 (Fed. Cir. 2003) ("*Nippon Steel*").

Petitioners further contend that NXGH's accounting records for NXGH's Helan factory included production actually undertaken at NXGH's Yinchuan factory, quoting the NXGH Report at 20. Petitioners argue that none of NXGH's COP amounts booked in NXGH's records can be considered accurate, and NXGH's accounting records are irreconcilable with the reported FOP data. In addition, Petitioners argue that NXGH's practice of booking non-labor as labor into NXGH's books and records as a means to raise funds (*see* NXGH Report at 2 and 15) calls into question the integrity of NXGH's records as a whole. Petitioners contend that this practice ensures that the Department would be unable to verify the reported labor FOPs even if NXGH had been sufficiently prepared to allow the Department to reach that portion of the outline. Petitioners further argue that these alterations of NXGH's books and records render NXGH's production and accounting records irreconcilable and undermines the overall veracity of NXGH's data, and, therefore, Petitioners argue, these data cannot be relied upon and the application of FA is warranted. *See* 19 U.S.C. § 1677e(a)(1) and (2)(D).

Petitioners also assert that NXGH did not report FOP information for certain chemicals used in the impregnation of certain products, citing Jacobi Supp and NXGH Report at 21. Petitioners argue that, because the Department was unable to pursue this matter further at verification (*id.*), complete FOPs of NXGH's impregnated activated carbon are not on the record, necessitating the application of FA under 19 U.S.C. § 1677e(a)(1) and (2)(D). Petitioners note that the Department requested further information from NXGH regarding differences between the combined weight of the inputs and the output of further processed material. In response, Jacobi indicated that chemical reactions may create weight changes and that product-wide allocations may also result in inaccuracies, but also stated that NXGH has no inventory data for its chemical inputs, but most quantities purchased should equal consumption quantities (*see* Jacobi Supp at 94-95). Petitioners argue that this reporting methodology is unreliable and supports the application of AFA, consistent with the Department's determination in *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006), and accompanying Issues and Decision Memorandum ("*Diamond Sawblades I&D Memo*") at Comment 36, where the Department applied the single highest consumption factor as partial AFA when it was unclear if a respondent reported graphite mold consumption based on actual production or based on purchases. Petitioners argue that, because the Department could not verify the accuracy of NXGH's books and records or the reason for the discrepancy between the weights reported and those in its books and records for further processed materials, NXGH's production quantity and value cannot be reconciled and necessitates the application of FA. *See* 19 U.S.C. § 1677e(a)(2)(D). Petitioners further contend that NXGH was also unable to tie its total COP records to the FOPs reported in the questionnaire response because NXGH reported COP data for a limited quantity of the total quantity sold to Jacobi. Petitioners argue that NXGH's decision to report only merchandise identified by Jacobi as ultimately exported to the United States[9] demonstrates that Jacobi withheld critical information from the Department. Petitioners assert that this constitutes withholding or providing misleading information which meets the standard for application of FA under 19 U.S.C. § 1677e(a)(2)(A).[10]

[9] *See* NXGH Report at 11.

[10] *See also Shanghai Taoen Int'l Trading v. United States*, 360 F. Supp. 2d 1339, 1345 (CIT 2005) ("*Shanghai Taoen*").

Petitioners also argue that the Department was unable to verify NXGH's reported CARBMAT consumption. Petitioners argue that though NXGH was unprepared for verification, the Department provided NXGH with an opportunity to correct errors and find the necessary information (*see* 19 U.S.C. § 1677m(d)). Petitioners argue that the data provided demonstrated errors in the reporting of self-produced and purchased CARBMAT. Petitioners contend that NXGH's minor corrections submitted on the first day of verification, which modified the ratios of self-produced to purchased CARBMAT (*see* NXGH Report at 2-3), were not minor and that the Department is not required to accept these data for use in the final determination. Petitioners further argue that these corrected data also could not be reconciled or verified. Petitioners also assert that NXGH did not initially provide the means to tie the production quantities to the yield loss reports or the yield loss reports to the COP worksheet, but the Department provided an NXGH with an opportunity to comply with the Department's request (*see* 19 U.S.C. § 1677m(d)), which was not required.[11] Petitioners further argue that NXGH's accounting and production records are irreconcilable due to the differences in the quantities reported in the accounting and production records for every month of the POI at the Yinchuan factory, and for four months at the Helan factory (*see* NXGH Report at 18-20), making NXGH's overall response unverifiable. Petitioners contend that NXGH withheld until verification that its reported CARBMAT consumption was based on ratios rather than actual experience. *See* NXGH Report at 2-3. Petitioners allege that using NXGH's revised ratios is unwarranted because NXGH failed its overall COP reconciliation and other FOPs were unverified due to lack of preparedness or discrepancies found. Petitioners argue that, as it is the respondent's responsibility to provide complete and accurate data, the Department should not have to reconstruct the record. *See Shandong Huarong*, Slip Op. 2003-135 at 12. Petitioners argue that the data are so unreliable as to make correcting the data or applying neutral facts available insufficient. In addition, Petitioners assert that, because NXGH's highest reported values are also unreliable due to the failure to reconcile COP, partial AFA is also insufficient.

Petitioners also argue that Jacobi's U.S. sales database has numerous errors and omissions. Petitioners note that the Department discovered at verification that all commissions were misreported and the magnitude of the error is unknown. Further, Petitioners argue that Jacobi reported numerous errors on the first day of verification. *See* Jacobi US Report at 2-3. Petitioners also argue that Jacobi misrepresented indirect selling expenses in the United States,[12] and failed to report U.S. sales expenses recorded by Jacobi AB in Sweden.[13] Petitioners contend the correction of these errors necessitates a substantially new U.S. sales database, and, because these are not the only errors made by Jacobi, the breadth of the changes should not be accepted and the Department should not use the new data requested by the Department on January 8, 2007, and should instead rely on total AFA.

Petitioners argue that the data submitted by Jacobi as a result of Department's January 8, 2007,

[11] *See Shandong Huarong*, Slip Op. 2003-135 at 12.
[12] *See* Jacobi Section C&D at Exhibit C-1; Jacobi Supp at Exhibit Q#42b; and Jacobi US Report at 16
[13] *See* Jacobi AB Report at 6 and 11.

request for information as a result of verification[14] should not be used for the final determination. Petitioners argue that they have not had sufficient time to analyze the data and that these data should be considered new, unverified, responses. Petitioners further contend that Jacobi has provided no explanation of the changes made and that the new data, submitted on January 11, 2007, have no reliability and should not be used for the final determination. Petitioners argue that to use these data would be prejudicial, as none of the data have been verified. *See* 19 U.S.C. § 1677m(i). Petitioners further argue that it is the Department's policy to not accept new information at verification[15] and, therefore, these data should not be accepted after verification, and these data should not be used.

Petitioners argue that Jacobi has failed verification of information necessary for calculating an accurate margin, and Jacobi's response should not be used for the final determination. Petitioners contend that Jacobi's suppliers NXGH and DTHB failed verification by failing to adequately prepare for verification, incorrectly limiting reporting, fabricating COP and labor data in accounting books, being unable to verify major inputs, and failing to reconcile accounting and inventory records to each other and the response. Petitioners argue that these deficiencies make NXGH and DTHB's data unusable. Petitioners argue that using partial FA from Jacobi's other suppliers is not tenable as the failure of DTHB and NXGH at verification should be imputed to all suppliers. Petitioners assert that Jacobi Tianjin also failed critical aspects of verification, and Jacobi's U.S. sales database revisions should be considered an inappropriate new response. Petitioners argue that, for these reasons, Jacobi's responses cannot be used, and partial FA is not reasonable due to the number of changes necessary.

Petitioners assert that the Department provided Jacobi with multiple opportunities to provide complete and accurate data including its original and supplemental questionnaire responses,[16] but aver that Jacobi improperly limited reporting. Petitioners contend that Jacobi was provided a detailed verification outline and additional opportunities to correct errors in the provided information at verification but did not respond to the requests, nor, Petitioners contend, could large portions of Jacobi's responses be verified. Petitioners argue that *Borden v. United States*, 4 F. Supp. 2d 1241, 1245-46 (CIT 1998) is applicable in this case, as Jacobi has failed to act to the best of its ability.[17] Petitioners argue that the Department is permitted to apply total AFA when an interested party has failed to cooperate to the best of its ability to comply with requests for information and demonstrate that it put forth its maximum effort.[18] Petitioners further contend that the Court of International Trade ("CIT") has held that withholding information or misleading the Department is grounds for the application of FA under 1677e(a) and for AFA under 1677e(b) and Jacobi should not be considered to be putting forth a maximum effort. *See, e.g.*, *Shanghai Taoen*, 360 F. Supp. 2d at 1345; *Nippon Steel*, 337 F. 3d at 1382-1383. Therefore, Petitioners assert, Jacobi should be subject to AFA based on its withholding and

[14] *See* Memorandum to the File: Request for Electronic Submission of Certain Information from the Verification of the Sales and Factors Response of Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc., dated January 8, 2007 ("Post-Verification Data Request").
[15] *See*, *e.g.*, Letter from Carrie Blozy to Jacobi dated October 13, 2006, at 2; *Shandong Huarong*, Slip Op. 03-135 at 12.
[16] *See* Jacobi response dated June 1, 2006 ("Jacobi Section A"), response dated July 3, 2006 ("Jacobi Section A Supp"), Jacobi FOP Supp, Jacobi Supp, Jacobi 2nd Supp, and Jacobi 3rd Supp.
[17] *See also* 19 U.S.C. § 1677m(d) and (e)(2) and (4).
[18] *See* 19 U.S.C. § 1677e(b); *Nippon Steel* 337 F. 3d at 1383.

misrepresenting information at NXGH, refusal to provide the requested information at Jacobi Tianjin, and inability to complete verification at DTHB and NXGH. Petitioners argue that applying partial AFA is insufficient and would not provide an incentive to more accurate reporting, and would not be more valid. Petitioners argue that the Department's practice does not allow for acceptance of new responses when significant errors are found,[19] and, Petitioners contend, in this case corrections cannot remedy the failure. Petitioners argue that the types of failures by Jacobi's suppliers are similar to those observed in prior Department cases when the Department applied total AFA, and the Department should do so in the instant investigation.[20]

Jacobi argues in its rebuttal brief that total AFA is unwarranted, as Jacobi and each of its suppliers have cooperated to the best of their ability to comply with the Department's requests for information. Jacobi contends that the record evidence demonstrates that Jacobi and its suppliers provided all information requested by the Department in the form and manner requested within the deadlines for submitting such information. Jacobi further argues that it cooperated at five verifications and acted to the best of its ability to provide the Department with the requested information. Jacobi asserts that any errors in its data are minor or inadvertent. Jacobi argues that the Department's inability to cover all items in the verification outline were due to time constraints. Jacobi also alleges that Petitioners' allegations are contrary to the record and the law, which demonstrates that Jacobi acted to the best of its ability and, therefore, Jacobi argues, do not warrant applying an adverse inference for the final determination.

Jacobi asserts that the Department uses facts available only when a party withholds information that has been requested or fails to provide information by the deadline in the form or manner requested, significantly impedes a proceeding, or provides information that cannot be verified. *See* 19 U.S.C. § 1677e(a)(2). Jacobi argues that the Department may only apply an adverse inference when a party failed to act to the best of its ability in responding to the Department's request for information.[21] Jacobi further argues that in *Nippon 2000*, the court held that the Department must find that a respondent could have complied but refused to do so. *Id.* at 1379-80. Jacobi argues, citing its responses, that it responded to the Department's questionnaires in detail based on the records kept in the ordinary course of business, and further argues that the Department did not reject any of these responses for failing to meet the Department's guidelines. Jacobi also contends that it exerted a maximum effort to cooperate with the Department. Jacobi argues that its full cooperation is demonstrated by the fact that it received complete and accurate data from five unaffiliated suppliers, including information considered a trade secret by an

[19] *See, e.g., Tianjin Machinery Import & Export Corp. v. United States*, 353 F. Supp. 2d 1294 1304-05 (CIT 2004); *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review*, 56 FR 65228 (Dec. 16, 1991) at Comment 46; *Final Determination of Sales at Less Than Fair Value: Nitromethane From the People's Republic of China*, 59 FR 14834, 14835 (Mar. 30, 1994).

[20] *See, e.g., Natural Bristle Paintbrushes and Brush Heads From The People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 64 FR 27506, 27508 (May 20, 1999) ("*Paintbrushes Final*") at Comment 1; *Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006) and accompanying Issues and Decision Memorandum ("*Artist Canvas I&D Memo*") at Comment 11; and *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico*, 68 FR 68350-51 (Dec. 8, 2003) ("*Mexico Wire Strand*").

[21] *See* 19 U.S.C. § 1677e(b) and *Nippon Steel Corp. v. United States*, 118 F. Supp. 2d 1366,1377 (CIT 2000) ("*Nippon 2000*").

unaffiliated supplier, NXGH. *See* Jacobi 2nd Supp at 15-16 and Jacobi 3rd Supp. Jacobi argues that by submitting its own records and obtaining the cooperation of unaffiliated suppliers in the PRC, Jacobi substantially cooperated as a respondent. Pointing to its submission of minor corrections at the verifications of Jacobi Tianjin, Jacobi US, Jacobi AB, NXGH, and DTHB, Jacobi further argues that it did not impede the Department's investigation by submitting contradictory information, and that all errors were immediately submitted to the Department.

Jacobi argues that it prepared detailed packages of accounting records when that information was available at the verification site, contrary to Petitioners' claims. Jacobi argues that Jacobi Tianjin did not ignore the verification outline as the quantity and value reconciliation information is not maintained at Jacobi Tianjin. Jacobi contends that it explained that these records were maintained at Jacobi US, and that the reconciliation of quantity and value of U.S. sales and intra-company sales were completed at Jacobi US and Jacobi AB without discrepancies. *See, e.g.*, Jacobi Tianjin Report at 7; Jacobi US report at 10-12 ; Jacobi AB Report at 7-9. Jacobi argues that it cannot be penalized for not providing information that is not maintained by the respondent.[22] Jacobi also contends that it is not required to keep its books and records in a manner consistent with the Department's verification agenda. Jacobi further argues that the record evidence demonstrates that Jacobi Tianjin did not intend to disrupt the verification of Jacobi Tianjin's purchase and export records, as these sales are conducted by Jacobi AB and the only sales made by Jacobi Tianjin were fully verified by the Department. *See* Jacobi Tianjin Report at 7. Further, Jacobi argues, the Department verified Jacobi Tianjin's statements at the verification of Jacobi AB. *See* Jacobi AB Report at 8. Jacobi argues that this cooperation demonstrates that Jacobi should not be subject to AFA.

Jacobi also contends that its five unaffiliated suppliers cooperated to the best of their ability by providing all FOP information as requested by the Department, pointing to Jacobi's numerous FOP submissions on the record. Jacobi further asserts that NXGH and DTHB were fully cooperative at verification and prepared to the best of their ability. Jacobi argues that none of its suppliers withheld information and any inability to provide information was due to the method in which its ordinary books and records were kept. Jacobi further argues that when records were not available, DTHB, NXHH, and NXGH provided their best estimate based on their experience with a full explanation. *See* Jacobi Supp at 51, 77, 80, 96, and Exhibit Q#52. Jacobi argues that DTHB and NXGH are not mandatory respondents or related to Jacobi but successfully participated in the verification, demonstrating that Jacobi's responses should not be subject to AFA in the final determination.

Jacobi further argues that the application of partial AFA is also not warranted as the submitted data have been verified. Jacobi contends that the Department is required to calculate accurate margins and it is the Department's policy to use a respondent's reported FOPs as it leads to the most accurate results.[23] Jacobi also asserts that the court has held that the Department can correct any error, whether clerical, methodological, or substantive, provided that the error is presented to the Department prior the final determination and the need for the correction is

[22] *See Olympic Adhesives, Inc., v. United States*, 899 F. 2d 1565,1573 (Fed. Cir. 1990) ("*Olympic Adhesives*").
[23] *See, e.g*, 19 U.S.C. § 1677b(c) and (c)(1); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185,1191 (Fed. Cir. 1990); *Peer Bearing Company v. United States*, 182 F. Supp. 2d 1285,1294 (CIT 2001); *Shandong Huarong General Corp. v. United States*, 159 F. Supp. 2d. 714,719 (CIT 2001).

proven.[24] Jacobi argues that Petitioners' position with respect to Jacobi and its suppliers' minor corrections is inconsistent with the facts of the case in that NXGH prepared for verification and provided a number of packets available for review on the first day of verification. Jacobi also argues that the minor corrections presented by NXGH were made to ensure that Jacobi's margin could be calculated accurately, and that CCT also presented substantial minor corrections, and Jacobi and CCT submitted these corrections on the request of the Department. *See, e.g*, Jacobi's October 30, 2006, letter, Jacobi's January 11, 2007, submission, and CCT's January 17, 2007, submission.

Jacobi argues that the NXGH data changes are likely to result in higher FOP ratios, but were presented to allow the Department to calculate accurate margins. Jacobi also contends that these corrections were presented in a timely manner and verified by the Department (*see* NXGH Report at 1-3; 17-18). Jacobi argues that these corrections should be used by the Department in the final determination as they most accurately reflect NXGH's production experience, were presented in good faith, and were adequately proven. Jacobi argues that the presentation of minor corrections demonstrates Jacobi's cooperativeness, and to use partial FA would create distortions in Jacobi's margin calculation. Jacobi asserts that CCT also presented numerous minor corrections, which Petitioners are, Jacobi argues, advocating the Department accept, which is inconsistent with Petitioners' arguments with respect to Jacobi. Jacobi argues that the Department should treat all respondents equally with respect to the corrections presented at verification.

Jacobi also contends that the record demonstrates that the Department did not have time to verify certain information in Jacobi's responses, which should not undermine the veracity of Jacobi's responses for purposes of the final determination. Jacobi argues that in *Monsanto v. United States*, 698 F. Supp. 2d. 275,281 (CIT 1998) ("*Monsanto*"), the CIT affirmed the Department's ability to select which items to verify, and that the Department's practice is not to verify all data in the questionnaire response.[25] Jacobi argues that, consistent with this practice, the Department verified as many items as it was able in the limited time available for verification. Jacobi contends that time limitations should not be used as a basis for partial facts available in the final determination.

Department's Position:

The Department has determined that the application of AFA is appropriate with respect to the FOP data submitted by NXGH, but that the application of AFA is not appropriate for either DTHB or Jacobi Tianjin. Further, we also find that the application of total AFA for Jacobi is not appropriate.

Applicable Statute
Section 776(a)(2) of the Act provides that

> ...if an interested party or any other person--(A) withholds information that has been requested by the administering authority or the Commission under this title; (B) fails to

[24] *See Timken U.S. Corporation v. United States*, Court No. 05-1158, at 15 (Fed. Cir. 2006) ("*Timken*").
[25] *See Antidumping Manual*, Chapter 13 at 5 and 7 (January 22, 1998).

> provide such information by the deadlines for the submission of the information or in the form and manner requested subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

The statute requires that certain conditions be met before the Department may resort to facts available. Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency.

If the party fails to remedy the deficiency within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (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 provides that the Department, in selecting from the facts otherwise available, may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See also* SAA accompanying the URAA, H.R. Rep. No. 103-316 vol. 1, at 870 (1994). The Act provides, in addition, that in selecting from among the facts available the Department may, subject to the corroboration requirements of section 776(c), rely upon information drawn from the petition, a final determination in the investigation, any previous administrative review conducted under section 751 (or section 753 for countervailing duty cases), or any other information on the record. *See* 776(b) of the Act.

Pursuant to section 776(b) of the Act, the Department may use information that is adverse to the interest of that party when the party fails to cooperate by not acting to the best of its ability in responding to the Department's request for information. *See Nippon Steel*, 337 F. 3d at 1382. Further, section 776(b) of the Act authorizes the Department to use as AFA information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. In selecting a rate for adverse facts available, the Department selects a rate that is sufficiently adverse "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, 8932 (February 23, 1998) ("*Semiconductors*").

Analysis:

With respect to NXGH, the Department determines that the application of AFA is appropriate. On May 4, 2006, the Department sent out its sections A, C, and D questionnaire to Jacobi which

stated on page D-2 "if your company did not produce the merchandise under consideration, we request that this section be immediately forwarded to the company that produces the merchandise." Jacobi submitted FOPs for models supplied by NXGH on July 10, 2006. Jacobi also responded to several supplemental questionnaires. *See* Jacobi Supp, Jacobi 2nd Supp, and Jacobi 3rd Supp. Jacobi reported that NXGH was one of five suppliers that produced the merchandise under investigation and that it manufactured such merchandise at its Yinchuan and Helan facilities. Based on the information on the record of this proceeding, the Department relied on the information submitted by Jacobi with respect to NXGH in the *Preliminary Determination*.

The Department conducted its verification at NXGH between October 30, 2006, and November 1, 2006. At verification, the Department discovered that Jacobi was not prepared to conduct the verification of NXGH and its unpreparedness impeded the Department's ability to conduct a thorough verification of NXGH. Also, Jacobi did not cooperate to the best of its ability with the Department's request for information by preparing source documents for review during verification, as requested in the verification outline. Consequently, Jacobi failed to substantiate the majority of the FOPs reported by Jacobi on behalf of NXGH by failing to support the data reported in its questionnaire responses with source documents. As a result, Jacobi did not, as described below, substantiate a sufficient amount of its reported data for NXGH to construct a reliable antidumping margin using NXGH data. Specifically, in this context, Jacobi substantiated only one of its reported FOPs for NXGH, a minimal percentage of normal value (*see* Jacobi Final Analysis Memo at Attachment II for the applicable percentage), making it an insufficient basis for calculating a margin using NXGH data.

The Department finds that the use of facts otherwise available is warranted with respect to NXGH pursuant to section 776(a) of the Act. In general, section 776(a)(1) and (2) of the Act state that the Department may use facts otherwise available in reaching the applicable 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, (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified.

Specifically, the Department finds that reliable information to construct an accurate and otherwise reliable margin is not available on the record with respect to NXGH. *See* section 776(a) of the Act. Despite the Department's repeated attempts during verification to substantiate Jacobi's reported data from NXGH, as reported in Jacobi's questionnaire responses, the Department was unable to verify that NXGH's reported data accurately represented NXGH's production experience. Specifically the Department notes that the verifiers found issues with NXGH's reported quantity and value of sales to Jacobi, the completeness of NXGH's reported production inputs, and the consumption rates of all but one of Jacobi's reported inputs into NXGH's production process, with the result that almost none of the factors data could be verified.

The Department also finds that Jacobi withheld information and failed to provide the information requested by the Department in a timely manner and in the form or manner requested, making the application of facts available appropriate pursuant to sections 776(a)(2)(A) and (B) of the Act. Jacobi failed to follow the instructions detailed in the Department's verification outline. The purpose of submitting a verification outline to respondents in an investigation or review is to give respondents sufficient notice about the types of information and source documents that the Department will examine, and to afford respondents sufficient time to compile the information.

On October 13, 2006, the Department informed Jacobi that it intended to verify the FOP information submitted by Jacobi on behalf of NXGH on October 30, 2006, and October 31, 2006. The verification outline sent to Jacobi on October 13, 2006, 17 days prior to the start of verification, stated that Jacobi's "suppliers should be prepared to go over all items in the enclosed agenda." The Department also requested that counsel for Jacobi "reiterate to your client the statutory requirement for verification and note the following facts: (1) the information gathered during the verification will be used solely for the purposes of this proceeding; and (2) it is in your client's interest to cooperate since failure to permit verification may result in the Department relying on adverse "facts available" under section 776 of the Tariff Act of 1930, as amended ("the Act")." *See* Letter from Carrie Blozy to Albert Lo, counsel for Jacobi, dated October 13, 2006 ("Jacobi Supplier Outline"), at cover letter, page 1. In addition, the verification outline stated the following:

> "To facilitate the verification process, we have described the types of source documents that we will require to support the submitted data. As you are aware, the time available for the verification is limited. Consequently, we ask that the necessary information be gathered by the appropriate personnel prior to the verifiers' arrival. The verifiers will require copies of certain documents for the verification report. Copies of supporting documentation, along with English translations of all pertinent information, should be made **prior** to the verification…
>
> …It is the responsibility of the respondent to be fully prepared for this verification. If your client is not prepared to support or explain a response item at the appropriate time, the verifiers will move on to another topic. If, due to time constraints, it is not possible to return to that item, we may consider the item unverified, which may result in our basing the results of this administrative review on the facts available, possibly including information that is adverse to the interests of your client." *Id.*

The Jacobi Supplier Outline further instructed that Jacobi provide worksheets used to link responses to NXGH's records, complete financial statements, raw material inventory ledgers, raw material issuing tickets, and monthly records (for the POI) of raw material consumption at each production center. *Id.* In addition, the Jacobi Supplier Outline at pages 3 and 5 requested that NXGH prepare the following information:

> "Beginning with your sales system/journal, review the reconciliation worksheets and programs that tie the sales system/journal to the general ledger and into the financial statements sales total. Then tie the sales system to the quantity and value totals reported in Jacobi's Supplemental questionnaire response dated August 23, 2006, at Exhibit 51."

> "Prepare **three** sets of documents to support the reported per-unit consumption amount of material inputs. The package should include all purchase, inventory, production, and accounting records necessary to tie the per-unit amount reported to the general ledger. Be prepared to discuss the specifications used in the processing of activated carbon."

At no time prior to the verification did Jacobi contact the Department seeking additional time to prepare for verification, nor contact the Department with questions about the verification procedures, which documents to prepare for verification, or the verification outline.

During verification, Jacobi did not present documents in the manner requested by the Department in its verification outline to adequately demonstrate NXGH's quantity and value of sales to Jacobi, cost reconciliation, or any of its reported material, energy, or labor inputs. Certain source documents were not initially presented to the Department, and the Department found it necessary to make piecemeal requests for those documents in order to compile a verification record. *See* NXGH Report at 14, 16-17, and 20-22. In addition, certain documents were not presented despite repeated requests by the Department. *See* NXGH Report at 10-13 and 21.

Moreover, Jacobi withheld information from the Department by failing to disclose information in its questionnaire responses, provide information requested in the verification outline, or present information specified in the verification outline in a timely manner. During verification, the Department learned of missing information during its review of NXGH's cost accounting system, sales accounting files, and inventory ledgers. *See, e.g*, NXGH Report at 14-15 and 19-21. At no time prior to verification did Jacobi disclose the missing information to the Department, nor did Jacobi present the information as a pre-verification correction to NXGH's data, despite submitting significant revisions to the data reported on the onset of verification. *See* NXGH Report at 1-3. Jacobi's failure to provide to the Department this information prior to the onset of verification hindered the Department's ability to adequately examine the information during the course of verification. In addition, Jacobi failed to provide the Department with necessary documents, specifically requested in the verification outline, to substantiate their questionnaire responses regarding the veracity of NXGH's accounting and production records, shipments of the merchandise under investigation, and FOP usage rates. *Id.*

The Department found at verification on October 31, 2006, that NXGH was not prepared to tie the quantity and value totals reported (*see* Jacobi Supp at Exhibit 51) to its books and records, which was specifically requested by the Jacobi Supplier Outline at 3. *See* NXGH Report at 10. Department officials requested multiple times that NXGH officials supply the requested information, which Jacobi had more than two weeks to prepare since the issuance of the Jacobi Supplier Outline, but NXGH was unable to tie worksheets prepared for verification to source documents, and the difference between NXGH's books and records and the reported values were significant. *See* NXGH Report at 10-11 and Exhibit 7.[26]

[26] We note that while Petitioners allege that Jacobi limited the production reporting of NXGH, the Department did not find that NXGH included only Jacobi production in their FOPs, and the discrepancy cited to by Petitioners (at NXGH Report at 11) is in fact referring to the quantity and value of sales by NXGH to Jacobi that Jacobi submitted, which is different than the FOPs.

The Department conducted examinations at verification of NXGH's electronic accounting systems. On the second day of verification, the Department noted that NXGH purchased finished activated carbon during the POI. Jacobi reported in Jacobi 2nd Supp at 86 that NXGH produced all of the merchandise under investigation at NXGH's facilities. Department officials requested twice at verification that company officials document that these purchases were not resold to Jacobi during the POI. Jacobi did not supply the requested information, and the Department was unable to determine the magnitude of the omission due to Jacobi's failure to provide the requested information. *See* NXGH Report at 12-13.

On the first day of verification, Department officials examined the information prepared with respect to the requested cost reconciliation. The Department noted that the information provided was substantially incomplete, as it did not include any reconciliation of one of the two factories, nor any supporting documentation, which was specifically requested in the verification outline (*see* Jacobi Supplier Outline at 4). Department officials requested that the missing documentation be available at the beginning of the second day of verification, which delayed the completion of this portion of the verification until late in the second day of verification. The Department notes that the reconciliation is critical, as it demonstrates precisely how Jacobi links the underlying source documents of NXGH to the array of numbers and worksheets provided in its response.

As noted in the verification report, Jacobi reported that NXGH used a number of material inputs in the production of the merchandise under investigation. However, due to the noncooperation of Jacobi, the Department was only able to verify the raw material input of CARBMAT, an input that represented only a small portion of NXGH's normal value. *See* Jacobi Final Analysis Memo at Attachment II for each FOP's relative percentage of normal value. All other inputs into the production process were unverifiable as Jacobi did not provide the accounting records necessary to reconcile the reported amounts to NXGH's records. Certain inputs were found to have significant discrepancies between the reported amounts and the records found at NXGH. *See, e.g.*, NXGH Report at 19-21. For other inputs, Jacobi did not supply the requested information in the form or manner requested, which left the Department unable to reconcile the reported information to NXGH's books and records. *Id.* at 10-13 and 19-22. For other inputs, because of Jacobi's failure to have meaningful specifically requested information available to the Department in a timely manner in the form or manner requested, the Department was unable to begin verification of those items. *Id.* at 10-13, 21-23. With respect to the major input of CARBMAT, the Department noted the following in the NXGH Report at 17:

> "The package provided on the second day of verification included no inventory withdrawal slips or other documentation that would demonstrate the quantities of self-produced and purchased CARBMAT consumed in the production of the merchandise under investigation, nor any support for the quantity of activated carbon output on a product-specific basis. More importantly, the package included no information to explain the difference between the production records maintained in NXGH's ordinary course of business by the production departments of both {of NXGH's production facilities} Yinchuan and Helan and NXGH's accounting records, specifically the cost of production ledgers used to tie NXGH's records to its financial statements.

> Department officials provided NXGH an opportunity to address this discrepancy between their own books and records, and requested that NXGH demonstrate, using ledgers, vouchers, and supporting documentation, the difference between NXGH's own production records and NXGH's accounting records. We also requested that NXGH provide documentation to support the minor correction to its reported self-produced and purchased CARBMAT and the product-specific activated carbon output. The request for this information was given to NXGH by the end of the second day of verification, providing NXGH with a half day of verification to document these differences to the Department and provide the requested documentation with respect to consumption and production."

When presented with information at verification that was deficient, the Department notified Jacobi and provided Jacobi an opportunity to remedy the deficiency pursuant to section 782(d) of the Act. Jacobi stated to the Department at the beginning of the third day of verification that it had prepared documentation that would remedy the deficiency. However, the Department found that the information provided continued to show that the data submitted by Jacobi for NXGH did not tie to NXGH's books and records. *See* NXGH Report at 17-20. Specifically, we note that for each month of the POI, NXGH "books in their accounting records for COP a total production number that is different than the actual quantity of production produced at NXGH for both the Yinchuan and Helan factories." *See* NXGH Report at 20. Jacobi was unable to provide any documentation to support the discrepancies between the production records, which were used to report the FOPs for NXGH, and NXGH's accounting records.

Further, Jacobi provided no documentation to support the reported amounts for any of NXGH's chemical inputs. Department officials examined original inventory and purchase documents in an effort to provide Jacobi with an opportunity to demonstrate the reported amounts. However, upon examination of the original documentation, the Department discovered that additional, unreported inputs were present in NXGH's books and records. Due to Jacobi's failure to prepare as requested "three sets of documents to support the reported per-unit consumption amount of material inputs. The package should include all purchase, inventory, production, and accounting records necessary to tie the per-unit amount reported to the general ledger" (*see* Jacobi Supplier Outline at 5), the Department was unable to determine whether these unreported chemical inputs were used in the merchandise under investigation, undermining the credibility of Jacobi's response with respect to NXGH.

In addition, the Department found while conducting the cost reconciliation that the labor included in NXGH's cost of production did not comport with NXGH's attendance sheet. At the very least, Jacobi failed to report additional labor consumed by NXGH in the production of the merchandise under investigation. *See* NXGH Report at 15. Jacobi states in Jacobi Supp at 95 that in "NXGH's accounting books, both direct and indirect laborers were accounted in the cost of production" and stated in Jacobi 2nd Supp at 11 that Jacobi's suppliers maintain records showing the consumption of each of the raw materials reported and this information was used to compile the response. In addition, the Department notes that NXGH officials stated at verification that NXGH books additional workers in its accounting records to raise capital for other purposes. We note that the actual consumption of labor was in the sole possession of

Jacobi, and Jacobi's failure to disclose to the Department that it had not used NXGH's actual books and records in preparing the response demonstrates that Jacobi failed to act to the best of its ability in providing information that can be used to calculate accurate margins.

In addition, with respect to consumption of coal used in the carbonization stage of coconut-based products during the POI, Jacobi reported in Jacobi Supp at 91 that it used a ratio between coal and coconut CARBMAT in the production of coconut CARBMAT. In addition, Jacobi stated in Jacobi 2nd Supp at 11 that Jacobi's suppliers maintain records showing the consumption of each of the raw materials reported and this information was used to compile the response. However, at verification, the Department discovered that Jacobi reported NXGH's consumption of coal at the carbonization stage by subtracting from the total input quantity the actual consumption of coconut CARBMAT, and noted that none of the anthracite coal consumption figures reported to the Department tied to NXGH's books and records, and indeed the total input quantity was less than the total output quantity. *See* NXGH Report at 21. We note that the actual consumption of raw material inputs was in the sole possession of Jacobi, and Jacobi's failure to disclose to the Department that it had not used NXGH's actual books and records in preparing the response demonstrates that Jacobi failed to act to the best of its ability in providing information that can be used to calculate accurate margins. *See Tianjin Mach. Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1015 (CIT 1992), which states "the burden of creating an adequate record lies with respondents and not with Commerce."

The Department additionally finds that the use of facts otherwise available is warranted pursuant to section 776(a)(2)(C) of the Act when the respondent "significantly impedes a proceeding." In the instant case, Jacobi was unprepared to complete the verification of NXGH, and this unpreparedness, as detailed above, significantly impeded the verification process. Specifically, we note that Department officials began examining multiple FOPs as well as the cost reconciliation, but had to discontinue work on those items as information was not ready or available. As a result officials moved on to other items, giving Jacobi an opportunity to gather the necessary data. We note that this fact pattern is distinct from Jacobi's observation that the Department does not verify the whole response.[27] Packages were presented to Department officials that included none of the supporting documentation requested in the Jacobi Supplier Outline, and, in some cases, no documentation was prepared. *See, e.g*, NXGH Report at 17 and 20-21. The use of the facts otherwise available is to "induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner." *See Nat'l Steel Corp. v. United States*, 870 F. Supp. 1130, 1134 (CIT 1994). In the instant case, Jacobi was provided with an outline of the required information more than two weeks prior to the Department's arrival at NXGH. The information requested by the Department over the course of verification was available on site and could have been prepared prior to the Department's arrival at verification. Jacobi instead significantly impeded the verification process and failed to respond to the Department's requests in a timely manner, resulting in the inability of the Department to complete the majority of the verification outline.

Department officials provided Jacobi numerous opportunities over the course of the verification to provide the Department with documentation sufficient to complete the verification, providing

[27] We note that "complete" in this context means completing the items started rather than verifying the entire response.

detailed instructions as to the types and number of documents required (*see* NXGH Report at 17). Jacobi's unpreparedness significantly slowed the verification of NXGH's data, which, in addition to the significant discrepancies noted above, prevented the Department from completing a verification of any of NXGH's energy or packing inputs. We additionally note that, due to the failure of Jacobi to cooperate to the best of its ability and provide the information requested with a significant time to compile the requested information, all but one of NXGH's reported FOPs remain unverified. The Department notes that while Jacobi had, at a minimum, two weeks to prepare the requested information (*i.e.*, the date on which Jacobi received the verification outline), Jacobi should have linked the reported FOPs to NXGH's books and records upon submitting NXGH's FOPs to the Department in the Jacobi Section C&D, as these data are presupposed to be based on the actual books and records of a respondent.

If the party fails to remedy the deficiency within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) of the Act if: (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 provides that the Department, in selecting from the facts otherwise available, may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See also* SAA accompanying the URAA, H.R. Rep. No. 103-316 vol. 1, at 870 (1994). The statute provides, in addition, that in selecting from among the facts available the Department may, subject to the corroboration requirements of section 776(c) of the Act, rely upon information drawn from the petition, a final determination in the investigation, any previous administrative review conducted under section 751 of the Act (or section 753 of the Act for countervailing duty cases), or any other information on the record. In the instant case, as described in detail above, Jacobi's submitted NXGH data could not be verified, and thus the application of facts available is appropriate, and, because Jacobi failed to act to the best of its ability in providing the requested information that was in its sole possession, the application of an adverse inference is appropriate. *See* section 776(b) of the Act.

With respect to Jacobi's assertion that any errors in its reported data are minor or inadvertent, the Department notes that the fundamental inability to complete a reconciliation of NXGH's accounting records to the reported data, and the failure to complete verification of all but one of NXGH's FOPs, is not minor. *See* Jacobi Final Analysis Memo at Attachment II for each FOP's relative percentage of normal value. The discrepancies found between the basis for the reported production quantity and NXGH's accounting records calls into question nearly all of NXGH's reported FOPs, as the production quantity is used in the denominator of a majority of NXGH's FOPs and demonstrates that Jacobi's responses with respect to NXGH were neither accurate nor complete. With respect to Jacobi's argument that the inability to complete the verification outline was a result of the time available for verification, we note that NXGH was given more time for verification than any other supplier in this investigation, and it was Jacobi's unpreparedness that created significant delays in the completion of the verification outline. The

Department also notes that two other suppliers in this investigation completed all items on the verification outline, and one of Jacobi's other suppliers, DTHB, also completed a majority of the verification outline, in sharp contrast to NXGH. While Jacobi argues that it "provided a great number of verification packets available for the Department's review on the first day of verification" (*see* Jacobi's rebuttal case brief dated January 22, 2007 at 10), we note that a respondent should not benefit from merely providing documents that do not contain the requested information or are inaccurate. As noted above, the Department finds that Jacobi could have complied with the Department's requests, but refused to do so, contrary to Jacobi's assertion. Jacobi was provided with the verification outline more than two weeks prior to the onset of the NXGH verification, which included specific requests to reconcile the reported quantity and value of sales to Jacobi, and provide complete document packages with source documentation to demonstrate the reconciliation of COP and reported amounts of FOPs. In addition, as discovered throughout the course of verification, Jacobi had these documents on site at NXGH, as demonstrated in some cases by their later presentation, but they were not presented to the Department in a timely or complete manner, significantly impeding the verification. *See* section 776(2)(C) of the Act. We note that the Department did not elect to forego verification of certain items on the outline due to time constraints as Jacobi suggests, but was impeded from doing so by Jacobi's failure to cooperate to the best of its ability, and Jacobi was also unable to demonstrate the accuracy of its reported data that was examined in nearly every case. Therefore, we find the application of partial AFA is warranted.

For the reasons discussed above, we have determined that Jacobi has failed to cooperate by not acting to the best of its ability to comply with a request for information with respect to NXGH and an adverse inference is warranted pursuant to section 776(b) of the Act. This position is consistent with that taken by the Department in *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 48612 (July 25, 2002), and accompanying Issue and Decision Memorandum ("*Cased Pencils Issues and Decision Memo*") at Comment 10, which cited *Ferrovanadium and Nitrided Vanadium From the Russian Federation: Notice of Final Results of Antidumping Duty Administrative Review*, 62 FR 65656, 65658 (December 15, 1997) ("*Ferrovanadium and Nitrided Vanadium*"). In *Ferrovanadium and Nitrided Vanadium*, the Department stated "by failing to respond Chusovoy {the producer} is an interested party which has not cooperated to the best of its ability under section 776 (b) of the Act. Therefore, we have continued to use an adverse inference in selecting from the facts available to determine the margins for Galt's sales of Chusovoy-produced merchandise ..." Therefore, as partial AFA, we have assigned the weighted average of the two highest CONNUM-specific calculated normal values from any supplier of CCT or Jacobi to the sales of merchandise manufactured by NXGH. Due to the proprietary nature of these calculations, *see* Memorandum to the File: Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China: Calculation of Adverse Facts Available Rate, dated February 23, 2007 ("AFA Memo"). With respect to Petitioners' argument that that the Department should impute this failure to Jacobi's other suppliers, *see* Comment 13, below.

With respect to DTHB, Jacobi Tianjin, and Jacobi US, the Department finds that the application of facts available is unwarranted.

Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act provides that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title. Section 782(e) of the Act also provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (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 in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties. In the instant case, we note that the Department found in the *Preliminary Determination*, 71 FR at 59727, that DTHB, Jacobi Tianjin, and Jacobi US's data were submitted by the deadline, potentially verifiable, and not so incomplete that they cannot be used. After the *Preliminary Determination*, the Department conducted a verification of each of these entities pursuant to section 782(i)of the Act. *See* DTHB Report, Jacobi Tianjin Report, and Jacobi US Report.

With respect to DTHB, the Department finds that Jacobi submitted the requested information by the deadlines, DTHB's data were in large part verified, were not so incomplete as to be unreliable for calculating margins, Jacobi has acted to the best of its ability to provide the information, and DTHB's FOP data were in a usable format. We note that, while DTHB experienced difficulties during the verification, Jacobi was able to demonstrate that DTHB's books and records reconciled to the data reported, and the Department was able to complete a verification of the majority of normal value. Specifically, the Department notes that DTHB submitted minor corrections on the first day of verification, which the Department verified. *See* DTHB Report at 1-2. In addition, DTHB was able to demonstrate that it accurately reported the largest input into DTHB's production process, CARBMAT, as well as reconciling its costs of production to its financial records and Jacobi's submissions to the Department. The Department also notes that DTHB provided verification packages for the inputs of CARBMAT, steam coal, lump coal, and by-products, as well as for the reconciliation of the quantity and value of shipments to Jacobi upon request. *See* DTHB Report at 8-9 and 13-16. The Department notes that while the verification of chemical inputs was not conducted in the material inputs section of the outline, the Department was able to adequately verify these inputs during its cost reconciliation. *Id*. at 11. Further, DTHB responded to the Department's requests for completeness information, and despite discrepancies in the information initially presented to the Department, Jacobi was able to address the discrepancies in a timely manner and acted to the best of its ability in providing the requested information, enabling the Department to complete the verification of the majority of normal value. Therefore, the Department has determined, for this final determination, that that application of AFA to Jacobi with respect to DTHB is

inappropriate pursuant to section 782(e) of the Act. Further, where the Department found that Jacobi had made errors in reporting to the Department the FOPs of DTHB, the Department notes that the verified information is on the record with respect to these changes,[28] and therefore the use of facts available is inappropriate. *See* section 776(a)(1) of the Act and Jacobi's January 11, 2007, submission.

With respect to Petitioners' argument that the Department should apply AFA to DTHB's data because DTHB was also selected as a mandatory respondent, we note that in its *Preliminary Determination*, the Department explained that it "does not find that failure to participate as a mandatory respondent should affect the inclusion in a combination rate for another participating mandatory respondent. Section 776(a)(2) of the Act does not provide for the application of adverse facts available for an exporter, in this case Jacobi and CCT, where the information on the record demonstrates that it has provided the information requested by the Department in a timely manner, irrespective of the separate status of any of its suppliers." *See Preliminary Determination*, 71 FR at 59730. Therefore, the Department has not applied FA to DTHB for the final determination. With respect to Petitioners' argument that DTHB did not reconcile its quantity and value of shipments to Jacobi, we note that the DTHB Report at 8-9 states that the difference between the invoiced amounts in the accounting records and the quantity shipped to Jacobi is a result of certain shipments that were booked during the POI but not shipped during the POI for both quantity and value, and, therefore, Petitioners' claim is incorrect. Although Petitioners argue that the Department was also unable to verify a number of DTHB's FOPs, which they claim is grounds for AFA, the Department notes that the court has affirmed "a verification is a spot check and is not intended to be an exhaustive examination of the respondent's business." *See Fag Kugelfischer Georg Schafer Ag v. United States*, 131 F. Supp. 2d 104, 133 (CIT 2001). In addition, the Department has "authority to "spot check" data at verification." *See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France*, 67 FR 78773, 78776 (December 26, 2002). As per its standard procedures, the Department conducted a verification of the major inputs into the production process and the cost reconciliation prior to its verification of other items. As noted above, the Department was able to verify the inputs of CARBMAT, DTHB's reported byproduct, steam coal, lump coal, and chemical inputs, a significant portion of DTHB's calculated normal value. *See* Jacobi Analysis Memo and accompanying calculations. Therefore, we find that Jacobi cooperated to the best of its ability with respect to DTHB and the information necessary to calculate an accurate margin is on the record of this investigation, making the application of facts available inappropriate with respect to Jacobi's sales sourced from DTHB.

With respect to Jacobi Tianjin, while we agree with Petitioners that Jacobi was unprepared for verification, the facts of the instant case do not justify the application of AFA with respect to Jacobi Tianjin. The Department notes as an initial matter that it determined in the *Preliminary Determination* that Jacobi AB was the appropriate mandatory respondent in this case.[29] In the Jacobi Affiliation Memo, the Department noted that Jacobi Tianjin does not take title to the

[28] The Department notes that it verified that Jacobi submitted in its January 11, 2007, submission, only that information requested by the Department on January 8, 2007.

[29] *See Preliminary Determination*, 71 FR at 59725, *citing* Memorandum to the File: Certain Activated Carbon from the People's Republic of China: Affiliation and Treatment of Sales of Jacobi Tianjin International Trading Co., Ltd., Jacobi Carbons AB, and Jacobi Carbons, Inc., dated October 4, 2006 (''Jacobi Affiliation Memo'')

merchandise, nor negotiate any aspect of the transaction between the affiliated reseller in the United States and the suppliers of the merchandise, and Jacobi AB is the actual respondent in this investigation. This finding was reinforced by the verification of Jacobi Tianjin in which, during the verification of the sales process, the Department noted "no documents that could be examined with respect to Jacobi Tianjin's shipments on behalf of Jacobi AB located in Tianjin. Ms. Wu explained that she receives in Sweden a purchase order from Jacobi US, orders activated carbon from domestic suppliers, and the domestic supplier delivers the merchandise to Jacobi Tianjin. She noted that upon receipt of the merchandise, Jacobi Tianjin tests, re-packs, and marks the merchandise for export and readies the merchandise for shipment. She explained that all documents are maintained in Sweden…" *See* Jacobi Tianjin Report at 5.

In *Olympic Adhesives*, the court found that the Department's authority to apply facts available does not extend to situations in which the information or data requested is not able to be produced because these data do not exist. *See Olympic Adhesives* 899 F. 2d 1565,1572-3. That situation applies in this case to sales documentation at Jacobi Tianjin. However, the Department notes that Jacobi Tianjin has been on notice since the verfication that the Department requires complete verifiable records, and in future proceedings will be required to present accurate and verifiable records. *See Nippon Steel*, 337 F. 3d at 1382-1383. Further, we note that the application of facts available is appropriate when the necessary information is not available on the record of the investigation, pursuant to section 776(a)(1) of the Act. We note that Jacobi Tianjin does not buy the merchandise under investigation from unaffiliated suppliers, does not sell this merchandise to the affiliated reseller in the United States, nor does it sell this merchandise to unaffiliated customers in the United States. Section 782(e) of the Act also provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (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 in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties. In the instant case, none of the information necessary to calculate accurate margins was in the possession of Jacobi Tianjin, as all relevant information is provided by Jacobi's unaffiliated suppliers in the PRC (*i.e.*, FOP information), Jacobi AB (*i.e.*, transportation expenses), or Jacobi US (*i.e.*, all other sales-related expenses), and with the exception of NXGH, all such information has been verified as complete. Therefore, the Department finds the information collected at the verification of Jacobi Tianjin is immaterial to the Department's margin calculation.

Further, while the Department agrees with Petitioners that Jacobi Tianjin did not provide the information requested by the Department to link physical shipments from unaffiliated suppliers to Jacobi Tianjin and Jacobi Tianjin's shipments to the United States, the Department finds that the critical documentary link was established by Jacobi through use of lot numbers. We note that Jacobi Tianjin officials explained that "each of these lot numbers appear on all documents issued by Jacobi in the ordinary course of business, including purchase orders, invoices, shipping documentation, etc., up to the invoice to the final customer in the United States," (*see* Jacobi

Tianjin Report at 7), a statement that is corroborated by the evidentiary record of this investigation. Specifically, Jacobi has provided detailed documentation demonstrating that the lot number appears on every important document involved in the purchase, shipment, or sale of the subject merchandise. At the verification of DTHB, the Department noted a lot number on the purchase order from Jacobi AB, DTHB's production records, DTHB's testing report, and DTHB's invoice to Jacobi AB. *See* DTHB Report at Exhibit 4. Further, we noted that the same lot number that was examined at DTHB appeared on the corresponding sale in the United States by Jacobi US, including on the international bill of lading, the purchase order from Jacobi US to Jacobi AB, the packing list, and the invoice to the customer. *See* Jacobi US Report at Exhibit 14. We note that Petitioners themselves acknowledge that the Department was able to verify the quantity and value of individual purchase from each of Jacobi AB's suppliers (*see* Petitioners' case brief at 11), which the Department tied to a purchase from an unaffiliated supplier and a U.S. sale. *See* Jacobi AB Report at 7-8. This, in conjunction with the successful verification of nearly all aspects of Jacobi US, is sufficient for the Department to find that Jacobi has demonstrated that it appropriately identified the supplier of each U.S. sale reported. In addition, with respect to the Department's verification that no further manufacturing was conducted at Jacobi Tianjin, we note that Jacobi Tianjin officials stated "the first batch of qualified merchandise was not completed until 2006." *See* Jacobi Tianjin Report at 6. We note that Petitioners have pointed to no information on the record that would demonstrate Jacobi Tianjin conducted further manufacturing operations, despite their claim that the Department should infer this conclusion. Therefore, in the absence of evidence on the record that the lot numbers assigned by Jacobi in its ordinary course of business and verified by Department officials are incorrect, the Department does not find that the application of partial AFA with respect to Jacobi's direct material cost is appropriate.

Finally, with respect to Jacobi's U.S. sales database, the Department agrees with Petitioners that Jacobi misreported its commissions. However, the Department found that all other expenses examined tied to both the data reported and Jacobi's financial records, including the quantity and value of sales. The Department's verification report of Jacobi US notes that all U.S. sales commission expenses were reported based on the invoice value, rather than on the purchase order value, which is how Jacobi paid its commission agent. The report further noted that this error reduced the reported commission for all transactions that the Department examined. *See* Jacobi US Report at 15. However, the Department does not agree with Petitioners that this one error is sufficient to justify the application of AFA with respect to Jacobi US, when all other aspects of Jacobi's U.S. sales database were found to be accurate. In fact, the manner in which Jacobi reported its U.S. commission expenses was to the detriment of Jacobi, and contrary to Petitioners' claim, the Department verified which transactions contained an error and the difference in the expense for a majority of the transactions. *See* Jacobi US Report at 15 and Exhibit 12. Therefore, because corrected, verified, commission information is on the record of this proceeding for a majority of the sales on which Jacobi reported commissions, the Department has used the information on the record with respect to these observations. For the final determination, as facts available, the Department will adjust Jacobi's reported commissions based on the information included in Jacobi US Report at Exhibit 12, but will not adjust the reported commissions where no information is available. *See* Jacobi Final Analysis Memo for a detailed discussion of this calculation.

With respect to Petitioners' allegations regarding indirect selling expenses, *see* Comment 19.

In addition, we disagree with Petitioners' request that the Department reject the minor corrections presented at the verifications of the Jacobi group of companies. As an initial matter, we note that the Department's verification outline requests that respondents present "minor corrections, if any, to the responses resulting from verification preparation," and the court has upheld the Department's discretion to accept corrections of clerical errors under the following conditions: "(1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) {Commerce} must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to {Commerce} no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the responses; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification." *See Maui Pineapple Co. v. United States*, 264 F. Supp. 2d 1244, 1261 (CIT 2003). NXGH, DTHB, and Jacobi US each submitted minor corrections at the onset of verification. *See* NXGH, DTHB, and Jacobi US Reports.

While the Department found NXGH's information to be unverifiable and will disregard this information for the final determination pursuant to section 776(a)(2)(D) of the Act, the Department conducted a complete verification of DTHB and Jacobi US's reported minor corrections, and these corrections were served on Petitioners' on November 22, 2006, and December 11, 2006, respectively.[30] Further, we note that the Department provided detailed instructions to Jacobi on the electronic submission of these data on January 8, 2007, to which Jacobi responded on January 11, 2007. Upon receipt of this information, the Department also verified that Jacobi included in its January 11, 2007, submission, only that information requested by the Department on January 8, 2007. Therefore, we disagree with Petitioners' argument that no explanation of the changes made was provided. Further, the errors found at verification, which include errors to DTHB's coal and chemical usage rates, U.S. commission expenses, and the unit price of one market economy bag purchase, are minor as in the case of the bag purchase, have been placed on the record in a usable manner as in the case of the DTHB errors, or are easily correctable as in the case of commission expenses (*see* above). Accordingly, as section 782(e) of the Act requires the Department not to decline to use deficient information where that information is submitted by the established deadline, can be verified, is not so incomplete that it cannot be used as the basis for the required determination, was provided by a party who acted to the best of its ability in providing the information and meeting applicable requirements, and can be used without undue difficulties, the Department has determined to utilize the data submitted by Jacobi on January 11, 2007, except as noted above.

Therefore, as discussed above, the Department will calculate a margin for Jacobi as described in detail in the Jacobi Analysis Memo, using Jacobi's reported data except with respect to NXGH, where we are using the weighted average of the two highest CONNUM-specific calculated normal values as the normal value of sales of merchandise manufactured by NXGH.

[30] For a description of the verification of these minor corrections, *see* DTHB Report at 8 and Jacobi US Report at 12-14 and Exhibits 10, 11, 13, and 14.

Comment 8: Treatment of Powdered Activated Carbon Sold to the United States

Petitioners argue in their case brief that Jacobi and DTHB have not provided record evidence that sales to the United States of PAC, which Jacobi claimed was a by-product of DTHB's production process, incurred no production costs, a burden that rests on Jacobi. Petitioners contend that because Jacobi has not demonstrated there were no costs associated with the production of this product, if the Department does not apply total AFA to Jacobi or DTHB the Department should apply partial AFA to this product. Petitioners argue that, as AFA, the Department should apply the highest consumption rate for any product produced by DTHB to this product.

Jacobi argues in its case brief that the Department should treat DTHB's PAC as a by-product. Jacobi asserts that the FOPs assigned to this PAC by the Department in the *Preliminary Determination* are inaccurate, as this product is an inadvertent result of the production of various quantities and qualities of GAC, and is treated by DTHB in its ordinary books and records as a by-product. Jacobi further argues that the Department's failure to treat this product as a by-product is contrary to record evidence. Jacobi asserts that it acted to the best of its ability and an allocated buildup of DTHB's FOPs is inappropriate. Jacobi argues the decision to apply a simple average of all usage rates reported by DTHB is incorrect according both to the facts on the record and the law governing the treatment of by-products.

Jacobi contends that the record evidence demonstrates that DTHB's PAC at issue should be characterized as a by-product, not a co-product or other subsidiary product and the Department should reverse its decision in the *Preliminary Determination* and treat DTHB's PAC as a by-product for the final determination. Jacobi asserts that the antidumping statute does not define by-product, and the Department's practice in this regard is based on precedent. Jacobi argues that the Department has found that 1) whether the by-product is manufactured at the same facility; 2) whether the quality and quantity of the by-product are determined by the production of the primary product; and 3) whether production is an unavoidable consequence of the production of the primary product to be relevant to determining whether a product is a by-product. *See Frozen Concentrated Orange Juice from Brazil: Final Determination of Sales at Less than Fair Value*, 52 FR 8324, 8329 (March 17, 1987) ("*Orange Juice*"). Jacobi contends that in *Orange Juice* the Department treated pulp and orange rinds as by-products because they were an unavoidable product of juice production, and in the *Final Determination of Sales at Less than Fair Value; Fall-Harvested Round White Potatoes from Canada*, 48 FR 51669, 51673-74 (November 10, 1983) ("*Potatoes*"), the Department made a comparable conclusion. Jacobi further argues that co-products are treated differently by the Department and can be characterized by whether 1) the product is separately accounted for as a separate finished product; 2) the product is <u>not</u> an unavoidable consequence of the production process; 3) the product is intentionally controlled and marketed by the manufacturer as a separate end product; 4) significant further processing is necessary for sale; and 5) the product and the subject merchandise are produced on separate machines.[31] Jacobi argues that co-products are

[31] *See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 61 FR 1328, 1334 (January 19, 1996) ("*Thailand Pipe and Tube*").

distinguishable from by-products by how the costs are captured in a respondents' accounting records and control over production.

Jacobi argues that DTHB's PAC is produced at the same facility as GAC, is an unintended result of production, is not intentionally marketed or controlled, and is unique from activated carbon products in the manner in which it is collected. *See* Jacobi's Section C&D at Section II page 4. Jacobi contends that the Department noted at verification that DTHB's PAC was segregated from GAC production and treated as a separate product, and only limited information (*i.e.*, total POI production quantity) is maintained by DTHB. *See* Jacobi Supp at 48-49 and Memorandum to the File: Verification of the Factors Response of Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc. in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated November 29, 2006 ("DTHB Report") at 7. Jacobi further argues that the Department's treatment of DTHB's PAC in the *Preliminary Determination* was artificial and unverifiable and creates a distortive effective on Jacobi's margin, as all costs for producing DTHB's PAC were captured in the production of GAC. Jacobi contends the Department should grant an offset to Jacobi's normal value for this product, consistent with the Department's practice to examine the surrogate financial statements to determine how by-products were treated, how a by-product should be applied, and consider whether the by-product was reintroduced or sold.[32] Jacobi contends that if the by-product was sold, the Department normally deducts the by-product after applying the surrogate financial ratios.[33] Further, Jacobi argues that it is the Department's practice to rely on data from the respondents' ordinary books and records and, Jacobi contends, the Department should rely on the normal accounting practices of DTHB in this case, where DTHB's PAC was treated as a by-product.

Jacobi further contends that the Department's treatment of DTHB's PAC in the *Preliminary Determination* was contrary to the law as the Department's practice and the statute do not require submission of complete FOP data for a by-product in order for it to be treated as such. Jacobi asserts that because DTHB does not maintain information necessary to create complete FOPs for this product in the ordinary course of business, any allocation methodology would be irreconcilable to DTHB's books and records. Jacobi argues that because DTHB's records are only maintained on product-specific and iodine level specific bases, and DTHB's PAC is a mixture of various iodine level products, it is unable to add the production of DTHB's PAC to the denominator of DTHB's FOP calculations and to do so would result in a less-accurate margin. *See* Jacobi response dated September 15, 2006 ("Jacobi 2nd Supp") at 12-13. Jacobi also contends no raw material costs are allocated to this product by DTHB in the ordinary course of business in accordance with PRC GAAP.

Jacobi argues that for the Department to continue to apply an artificial allocation of the average of all DTHB's FOPs to DTHB's PAC is contrary to past practice and record evidence

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[32] *See Guangdong Chemicals Import & Export Corporation v. United States*, Slip Op. 06-142, at 17 (CIT 2006) ("*Guangdong Chemicals*").

[33] *See, e.g*, *Guangdong Chemicals*, Slip Op. 06-142, at 17, *Final Redetermination Pursuant to Court Remand, Guangdong Chemicals Import & Export Corporation v. United States*, Court No. 05-00023, Slip Op. 06-13 (January 25, 2006) at 7 ("*Guangdong Remand*"); *Sinopec Sichuan Vinylon Works v. United States*, 366 F. Supp. 2d 1339, 1351 (CIT 2005).

demonstrating this product should be considered a by-product. Jacobi asserts that the Department's *Preliminary Determination* methodology creates a distortive affect on Jacobi's margin, as DTHB captured all production costs associated with DTHB's PAC in its primary product. Therefore, Jacobi argues, the Department should treat DTHB's PAC as a by-product and grant an offset to normal value for this product in the final determination.

Jacobi further argues that if the Department continues to deny the by-product offset in the final determination, the Department should adjust DTHB's FOPs to reflect the true inputs for DTHB's PAC. Jacobi argues that the iodine level of DTHB's PAC is less than 850, and therefore, the Department should, for the final determination, use the consumption ratios of products with an iodine value of less than 850 for DTHB's PAC. Jacobi also contends that the Department incorrectly inflated the DTHB PAC's FOPs by including the yield loss at the acid and water wash stages of production in the average applied, and should exclude this additional consumption from its calculation in the final determination. Jacobi asserts that the Department should also increase the denominator used to calculate the yield loss at the sieving stage by the total production of sieved by-product during the POI, and adjust all sieving stage FOPs accordingly. *See* Jacobi's case brief at 12-13.

Petitioners argue in their rebuttal brief that the Department appropriately treated DTHB's PAC as subject merchandise rather than a by-product in the *Preliminary Determination*. Petitioners assert that the Department should, however, apply AFA to this product rather than a non-adverse FA. Petitioners argue that the scope of this investigation includes all steam activated carbon, whether GAC, PAC, etc. Petitioners argue that PAC requires further grinding and could not have been inadvertently created. Petitioners contend that the only difference between DTHB's PAC and other PAC is that it is stored without regard to production run or iodine number. Petitioners also assert that mixing PAC of different iodine numbers does not make it a by-product, and note that this product was reported by Jacobi as activated carbon. Petitioners argue that DTHB's PAC is co-produced with other subject products and should be more properly considered non-prime merchandise. Petitioners argue, citing *Final Determination of Sales at Less Than Fair Value: Circular Welded Steel Non-Alloy Steel Pipe from the Republic of Korea*, 57 FR 42942 (Sept. 17, 1992) ("*Korea Circular Pipe*") at Comment 30, that non-prime merchandise is valued in the same manner as prime merchandise. Petitioners argue that in the instant case, DTHB refers to its PAC as non-qualified material, which is comparable to the production of seconds in the *Korea Circular Pipe* context, and therefore should be considered a co-product. Petitioners further argue that the existence of a market specifically for non-qualified PAC is not determinative, and also contend that DTHB's PAC would have been prime product if it had stored this merchandise by iodine number and production run and further crushed or sieved. Petitioners argue that it therefore necessarily holds the same cost structure as prime GAC.

Petitioners further contend that the cases cited by Jacobi in support of its position that DTHB's PAC should be considered a by-product are not probative, as none involve co-production of a product that is also subject merchandise. Petitioners note that both *Orange Juice* and *Potatoes* involves further processed non-scope products (*see Orange Juice*, 52 FR at 8329 and *Potatoes*, 48 FR at 51673-4). Petitioners also argue that in *Thailand Pipe and Tube*, there was co-production of a not in scope product from scrap. *See Thailand Pipe and Tube*, 61 FR at 1334.

Petitioners argue that DTHB's PAC meets the Department's definition of a co-product as defined in *Thailand Pipe and Tube* as it is a separate finished product that is not sold as waste (*id.*), and it is not an unavoidable result of production. Petitioners argue that because this product is subject merchandise, Jacobi must report FOPs for this product, and assert that Jacobi has not pointed to any case where the Department has permitted a respondent to report no FOPs for subject merchandise. Petitioners argue that, therefore, the Department should continue to calculate an FOP for this product or apply partial AFA.

Petitioners argue that Jacobi's claim that the Department should treat DTHB's PAC as a by-product based on DTHB's accounting records is inconsistent with *Guangdong Remand*, which does not deal with whether a by-product offset should be granted. Petitioners argue that in *Guangdong Remand*, the entitlement of an offset had been established, and that case dealt with how to incorporate that offset. *See Guangdong Remand* at 17. Petitioners also argue that Jacobi has not established that DTHB's classification of by-products is consistent with PRC GAAP pursuant to section 773(f)(1)(A) of the Act. Petitioners argue that DTHB's PAC shares the same production costs as other merchandise manufactured by DTHB sold in the United States, demonstrating that reporting no product-specific FOPs is unrepresentative of the costs associated with production and sale of this merchandise. *See* section 773(f)(1)(A) of the Act.

Petitioners further contend that the Department should not recalculate FOPs for DTHB's PAC based on products with an iodine number less than 850. Petitioners argue that the Department's *Preliminary Determination* methodology is correct if the Department does not apply AFA as it is using an average of all co-produced products. Petitioners allege that DTHB's PAC is produced with a mix of a variety of products and not limited to those with an iodine value less than 850. Petitioners argue that the Department should not exclude FOPs for production of acid washed products as DTHB Report at 7 indicates that DTHB's PAC may include acid washed products.

Department's Position:

We agree with Petitioners that DTHB's PAC is properly considered subject merchandise, and therefore must be assigned a cost. However, we also agree with Jacobi that the Department's *Preliminary Determination* methodology should be revised.

The scope of this investigation covers "all forms of activated carbon that are activated by steam or CO_2, regardless of the raw material, grade, mixture, additives, further washing or post-activation chemical treatment (chemical or water washing, chemical impregnation or other treatment), or product form. Unless specifically excluded, the scope of this investigation covers all physical forms of certain activated carbon, including powdered activated carbon ("PAC"), granular activated carbon ("GAC"), and pelletized activated carbon." *See Preliminary Determination* 71 FR at 59723.

Section 773(a) of the Act states that the Department will compare "export price or constructed export price and normal value" to determine whether subject merchandise is being, or is likely to be, sold at less than fair value. Further, in NME countries, the Department's regulations state that the Department "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." *See* section

773(c)(1)(b)(a) of the Act. Section 773(c)(3) of the Act further states that in calculating the factors of production the Department will include expenses including hours of labor required, quantities of raw materials employed, amounts of energy and other utilities consumed, and representative capital cost, including depreciation. In addition, if the "(1) 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 title, (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, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title." *See* section 776(a) of the Act. The Department is permitted to apply an adverse inference when 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." *See* section 776(b) of the Act.

Jacobi reported in its U.S. sales database subject merchandise sales of DTHB's PAC, which Jacobi explained DTHB considers a by-product of the production process, and has not argued that DTHB's PAC is excluded from the scope of this investigation. Indeed, we note that PAC is specifically included in the scope of the investigation, and therefore should be considered subject merchandise. *See* Comment 5 for a further discussion of PAC as subject merchandise. Further, we note that neither Jacobi nor DTHB is alleging that this merchandise is not activated carbon, rather DTHB notes that this merchandise is "non-qualified material." *See* DTHB Report at 7. The Department notes that "non-qualified material" could potentially, in this context, be considered non-prime material, however, although DTHB classifies this material as "non-qualified material" in the ordinary course of business, this merchandise is sold as subject merchandise in the United States. The court has consistently upheld the Department's prior determinations where the Department treated even non-prime materials as subject merchandise rather than a by-product. *See, e.g*, *IPSCO*, 714 F. Supp. at 1211; *Anshan* 358 F. Supp. 2d at 1236. The Court has also affirmed the Department's decision to treat as subject, non-prime merchandise that which no differences "other than quality and market value," and where the "same materials, processes, labor, and overhead go into the manufacturing lot which yields both grades." *See IPSCO, Inc. v. United States*, 965 F.2d 1056, 1058 (Fed. Cir. 1992) ("*IPSCO II*"). Therefore, irrespective of whether DTHB's PAC is treated by DTHB as prime or non-prime merchandise, the Department finds that the treatment of this merchandise as subject merchandise (*see also* Comment 5) is appropriate, and pursuant to the Court's decisions in *Anshan*, *IPSCO, and IPSCO II*, the Department has determined to calculate a cost for this merchandise.

The Department requested in its July 26, 2006, supplemental questionnaire at 20, that DTHB "provide complete processing information on {DTHB's PAC}, including in your FOP data the FOPs required to produce this CONNUM, including all material inputs, energy, and labor." Jacobi failed to provide the requested information in its FOP database submitted on August 23, 2006, stating that it cannot provide this information because it cannot trace the production of this by-product and to include the FOP data for this CONNUM would result in double-counting. In its September 8, 2006, questionnaire at pages 4-5, the Department provided Jacobi with an additional opportunity to report the requested information, stating: "Jacobi's concern regarding

double counting will not be at issue if Jacobi reports these products in the denominator of its FOP calculations. Therefore, Jacobi **must** provide complete FOP data for the production of this CONNUM, including all raw materials, energy, labor, and packing used. Continued failure to provide the requested information may result in the use of facts available for the Preliminary Determination." Jacobi again, in Jacobi 2nd Supp at 12-14, did not revise its FOPs, stating "it is impossible to revise these FOPs to include the by-product because Huibao has no way of determining which percentage of activated carbon powder contain what Iodine concentration" and to include an artificial allocation including DTHB's PAC in the denominator "would be less (not more) accurate." *See* Jacobi 2nd Supp at 12-13. Jacobi also noted that to include this product in the denominator would make DTHB's production and accounting records irreconcilable.

In the *Preliminary Determination*, the Department applied neutral facts available and used the best available information with respect to determining the factors of production for this product, applying the average of the unique CONNUM usage rates reported by DTHB in its unconsolidated database file to the unreported factors. *See Preliminary Determination*, 71 FR at 59734. The Department has determined, for this final determination, to continue to base the FOPs for DTHB's PAC on facts available. However, the Department notes that Jacobi has been on notice since the issuance of the Department's *Preliminary Determination* that the Department requires complete verifiable records, and in future proceedings will be required to present accurate and verifiable records. *See Nippon Steel*, 337 F. 3d at 1382-1383. The Department also finds, based on the information on the record collected at the verification of DTHB, that a revision to the allocation is appropriate.

We note that the narrative description of DTHB's production process and the provided FOP reconciliation (*see* Jacobi Section C&D) indicates that DTHB does not track the costs or usage rates associated with the production of DTHB's PAC separate from that of GAC. The Department also found at verification that DTHB does not track separately in its costs of production records the production of DTHB's PAC. *See* DTHB Report at Exhibit 3. Therefore, the Department finds that DTHB acted to the best of its ability to comply with the Department's requests for information and the application of AFA is inappropriate. *See* section 776(b) of the Act. However, the Department is required, pursuant to section 773(a) of the Act, to compare "export price or constructed export price and normal value" to determine whether subject merchandise is being, or is likely to be, sold at less than fair value. Because the necessary information was not available on the record, pursuant to section 773(c)(3) of the Act, the Department must apply facts available to construct FOPs for DTHB's PAC in order to calculate normal value, which will be compared to Jacobi's constructed export price for this product.

The Department noted at verification that activated carbon with higher iodine numbers remain in the activation furnace for longer periods of time, creating higher yield losses for higher iodine numbers. *See* DTHB Report at 7. We also noted that DTHB's PAC was comprised of different iodine numbers as it was generated in the sieving stage of production (prior to acid or water washing). *Id*. However, contrary to Petitioners' assertion, the Department confirmed at verification that DTHB's PAC, when sold, had specific iodine numbers. *See* DTHB Report at 9 and Exhibit 4 and Jacobi US Report at Exhibit 14. As such, it is possible for the Department to assign FOPs in this case based on FOPs for products more closely approximating the

merchandise at issue, rather than averaging all FOPs. Given that a closer approximation will yield a more accurate calculation, the Department used only those FOPs of DTHB's merchandise with an iodine number within the range of the iodine numbers of DTHB's PAC as sold, net of any acid or water washing, to calculate normal value for DTHB's PAC. *See* Jacobi Final Analysis Memorandum for a detailed description of the methodology used. In addition, for the reasons described below in Comment 9, the Department has determined not to add the quantity of DTHB's PAC to the denominator of the sieving stage calculation.

Comment 9: Whether to Recalculate Jacobi's FOPs to Include By-products in the Denominator

Jacobi argues in its case brief that the Department should grant a by-product offset for the suppliers that reported byproducts. *See* Comment 5. Jacobi argues that if the Department does not grant the by-product offset, the Department should increase the denominator used to calculate the yield loss at the sieving stage by the total production of sieved byproduct during the POI, and adjust all sieving stage FOPs accordingly for each of its suppliers that reported a by-product. *See* Jacobi's case brief at 12-14.

Petitioners argue in their rebuttal brief that the Department should not recalculate the sieving-related FOPs for all suppliers, as Jacobi chose not to report its FOPs in this manner. Petitioners also contend that the Department should not apply a recalculation to any of Jacobi's suppliers, as the sieving adjustments requested have not been verified as correct. Petitioners further argue that this adjustment should not be granted because neither DTHB nor NXGH, the suppliers selected for verification, successfully completed verification of labor or energy costs that would be adjusted under the requested methodology to modify Jacobi's reported FOPs in Jacobi's favor.

Department's Position:

While the Department agrees with Jacobi in principle, that the Department ordinarily should include all subject merchandise in the denominator, consistent with the CIT's decision in *Anshan*, in the instant case the Department does not find that it has sufficient information on the record with which to make this adjustment and, therefore, has determined to not recalculate Jacobi's FOPs for the final determination.

On September 8, 2006, the Department sent a supplemental questionnaire to Jacobi in which it stated the following:

> "The Department is considering whether the PAC generated by Jacobi's suppliers in its production process should be treated as a by-product, co-product, or subject merchandise for purposes of the Preliminary Determination. Therefore, in the interest of obtaining a complete record in this investigation the Department requests that Jacobi submit an additional factors of production ("FOP") database. In this database, please recalculate the FOPs for each supplier (and include these revisions in a consolidated database) to include the quantity of PAC generated during the POI (currently reported as a by-product) in the finished product figure included in the denominator of your calculations. Please also

insure that Jacobi has included all inputs into the production of these by-products (*e.g.*, additional energy used in milling, any powders used in mixing, etc.)."

See Letter from Carrie Blozy dated September 8, 2006, at page 3-4. Jacobi declined to respond to the Department's request, stating that "it is impossible to revise these FOPs to include the byproduct…{and}…it is virtually impossible for Jacobi to determine which denominator Jacobi should include what amount of activated carbon powder under which CTC or iodine level. If Jacobi has to make an artificial allocation, then the revised FOPs would be less (not more) accurate." *See* Jacobi 2nd Supp at 9-10. In its *Preliminary Determination*, the Department noted that "the products respondents have claimed as a byproduct are in fact merchandise within the scope of this investigation because they are still considered activated carbon, and, therefore, should not be considered a by-product. We are therefore not granting by-product credits in our margin calculations." *See Preliminary Determination*, 71 FR at 59736. 19 CFR 351.301(b)(1) states that interested parties may submit new factual information within "seven days before the date on which the verification of any person is scheduled to commence," which in Jacobi's case was October 16, 2006. Therefore, Jacobi had an additional opportunity to submit a new database which included the generated by-product in the denominator of its production after Jacobi was aware that we had denied the offset. The Department notes that another respondent in this investigation, CCT, submitted a new database including this production in the denominator. *See* CCT's response dated October 18, 2006, which was filed in response to the Department's supplemental questionnaire dated October 10, 2006, but additionally included revised FOPs based on the Department's *Preliminary Determination* finding to deny an offset for the reported by-products. In its case brief, for the first time, Jacobi proposed that the Department make an adjustment to its reported sieving stage FOPs for all unaffiliated suppliers that reported a byproduct.

Consistent with *Anshan Iron & Steel Co. v. United States*, 2003 CIT LEXIS 109, Slip. Op. 2003-83 at 34 ("*Anshan I*"), the Department has analyzed the methodology proposed by Jacobi in an effort to determine if sufficient information is on the record to correctly and accurately adjust Jacobi's reported FOPs. However, the Department has found that it has additional and clarifying questions with respect to Jacobi's proposed methodology. Specifically, the Department notes that Jacobi has proposed adjusting the "sieving process related" FOPs by a specific factor adjustment. With respect to supplier NXHH, the Department notes that NXHH has not reported a separate sieving stage and, within the activation stage (where it reported generating by-products), it is not clear which of the reported consumption variables on the FOP worksheet (included in Jacobi Supp at Exhibit 52 page 2) to which the adjustment should apply. In addition, for other suppliers, as Jacobi has indicated that further processing is conducted on these by-products (*See, e.g*, Jacobi Supp at 62), the Department is unable to determine whether any adjustment should be made to the further processing stages. Therefore, additional and clarifying questions are necessary to determine 1) whether Jacobi's proposed new methodology is correct; and 2) how the proposed adjustments should be applied.

The Department notes that the record in this case is closed and all case and rebuttal briefs have been received.[34] At the time Jacobi proposed its new methodology, there was not sufficient time

[34] "Factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed." *See* 19 CFR 351.301(b)(1).

prior to the final determination with which to request an entirely new supplemental questionnaire response from Jacobi, analyze the responses, potentially send out additional supplemental questions, and provide Petitioners sufficient time with which to comment on the new factual information prior to the final determination deadline of February 23, 2007. Moreover, we note that Jacobi refused to provide this information when it was requested by the Department. The burden of preparing a complete and accurate record is on the respondent. *See China Steel Corp. v. United States*, 306 F. Supp. 2d 1291, 1306 (CIT 2004) ("*China Steel*"). To the extent that Jacobi is requesting an adjustment be made in its favor, it has the burden of providing sufficient information to the Department to allow the Department to make that adjustment, especially when that adjustment is requested after the deadline for submitting new factual information. In addition, the Department notes that the adjustment proposed by Jacobi involves the recalculation of each of Jacobi's reported CONNUMs individually for each of Jacobi's reported unaffiliated suppliers for which the Department is calculating a margin, a burden that rests on Jacobi. *Id.* We note that the Department is, as discussed in Comment 8, calculating a revised FOP for one product sold by Jacobi and supplied by DTHB because the method for doing so is clear, the information is on the record, and the Department can do so without undue difficulty, but with respect to the sieving stage adjustment proposed by Jacobi, the Department does not find the adjustment to be practicable or accurate at this time. Therefore, the Department determines for this final determination that while the Department will be denying the by-product offset (*see* Comment 5), no adjustment to Jacobi's reported FOPs is appropriate with respect to the sieving stage by-product.

Comment 10: Whether to Apply Adverse Facts Available for DTFH

Petitioners argue in their case brief that DTFH has not provided meaningful qualitative data with respect to CARBMAT. Petitioners contend that DTFH has not explained what this material is, nor has DTFH supported the quantities reported for CARBMAT. Petitioners argue that to determine the per-unit consumption of CARBMAT, DTFH used yield ratios which were based on experience rather than actual documentation. *See* Jacobi Supp at 66. Petitioners assert that DTFH has also admitted that iodine-specific production records are destroyed after two months. *Id.* Petitioners allege that DTFH's reporting methodology is inappropriate in an NME analysis. Petitioners argue that any standard consumption methodologies used by respondents in an NME investigation must be used in the ordinary course of business and supported by documentation of recent consumption and adjusted by production variances. Petitioners argue that the consumption of CARBMAT is critical to the production process of the merchandise under investigation, and DTFH's reporting methodology requires the use of total AFA for all sales of DTFH-produced merchandise. Petitioners assert that the destruction of production records demonstrates that the response cannot be verified.

Jacobi argues in its rebuttal brief that none of its suppliers withheld information and that each of its unaffiliated suppliers acted to the best of their ability. Jacobi also argues that it cannot be penalized for not providing information that is not maintained by the respondent. *See Olympic Adhesives* 899 F. 2d 1565,1573. Jacobi also contends that when records were not available, the suppliers provided their best estimate based on their experience with a full explanation.

Department's Position:

We disagree with Petitioners that the application of AFA is appropriate with respect to DTFH. Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act provides that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (c) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title. Section 782(e) of the Act also provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (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 in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

In the case of DTFH, the Department found in the *Preliminary Determination*, 71 FR at 59727 that DTFH's data were submitted by the deadline, potentially verifiable, and not so incomplete that they cannot be used. Jacobi submitted on behalf of DTFH a complete Section D response and responses to several supplemental questionnaires. *See* Jacobi Section C&D, Jacobi Section C&D, response dated July 17, 2006 ("Jacobi FOP Supp"), Jacobi Supp, Jacobi 2nd Supp, and Jacobi response dated October 3, 2006 ("Jacobi 3rd Supp"). Jacobi submitted on behalf of DTFH detailed narratives regarding DTFH's production process and record-keeping, completed charts demonstrating the product-specific FOPs reported, samples of monthly summary reports and daily production reports. *See* Jacobi 2nd Supp at 65-67 and Exhibits 99a, 99b, and 99d. Petitioners' allegation that DTFH's data are based on unsubstantiated estimates is unfounded.

Jacobi has stated on the record that "DTF only keeps daily production records in respect to iodine-specific activation yield data during production for up to two months…{and}…these records were booked manually and discarded periodically" in the ordinary course of business. *See* Jacobi Supp at 66. Because DTFH does not maintain the CONNUM-specific records for the POI that would allow DTFH to report the POI-specific yield ratios, Jacobi constructed a reasonable alternative allocation methodology based on records maintained by DTFH, and provided examples of such records, responding in the form and manner requested to the Department's request for information. In addition, the Department did not elect to verify DTFH's submitted data under section 782(i)(1) of the Act and, therefore, no new information has been placed on the record that would call into question the data submitted by Jacobi on behalf of DTFH that would reverse the Department's decision in the *Preliminary Determination* to rely on these data. Further, the Department notes that the consumption of CARBMAT reported by DTFH was within the range of consumption by iodine number placed on the record by

Petitioners prior to the *Preliminary Determination*. *See* Petitioners' August 24, 2006, submission at 3.

In *Olympic Adhesives*, the court found that the Department's authority to apply facts available does not extend to situations in which the information or data requested is not able to be produced because these data do not exist. *See Olympic Adhesives* 899 F. 2d 1565,1572-3. In addition, the court has noted in *Nippon Steel*, that the Department must find that a reasonable respondent "would have known that the requested information was required to be kept and maintained" in order to apply an adverse inference. *See Nippon Steel*, 337 F. 3d at 1382-1383. As DTFH does not maintain POI product-specific FOP information in its ordinary course of business, and DTFH based its consumption figure on information it did maintain in the ordinary course of business, we find that Jacobi has acted to the best of its ability to provide the requested information with respect to DTFH, and the application of facts available is inappropriate. As such, the Department will rely on the FOP data submitted by Jacobi on behalf of DTFH in calculating normal values for the final determination. However, the Department notes that DTFH has been on notice since the issuance of the Department's questionnaire that the Department requires complete verifiable records, and in future proceedings will be required to present accurate and verifiable records. *See Nippon Steel*, 337 F. 3d at 1382-1383.

Comment 11: Whether to Apply Adverse Facts Available to Jacobi's Electricity and Labor

Petitioners argue that the Department should apply AFA to Jacobi's suppliers' electricity consumption. As AFA, Petitioners contend that the Department should set DTHB DTHT, and DTFH's electricity consumption to the highest value reported for any Jacobi supplier. Petitioners argue that the supplier at issue also has data problems, which should be taken into account when applying this factor. Petitioners propose that the consumption applied to DTHB, DTHT and DTFH should be based on an inflated consumption value from the supplier with the highest electricity consumption. *See* Petitioners' case brief at 36 and 38. For NXHH, Petitioners argue that the Department should increase NXHH's electricity consumption by 20 percent, and use this value as the basis for other suppliers' electricity consumption. Further, Petitioners note that if non-adverse FA is appropriate for DTHT, DTFH, and NXHH, the Department should increase their reported FOPs to include the missing electricity. *See* Petitioners' case brief at 36 and 38. With respect to NXGH, Petitioners argue that NXGH failed to verify electricity due to lack of preparation and therefore should be subject to partial AFA. However, if non-adverse FA is deemed appropriate for electricity, Petitioners argue the Department should increase NXGH's reported electricity FOP by the quantity of testing electricity consumed. Petitioners also argue that the Department should apply AFA to NXGH's labor consumption. As AFA for labor, Petitioners contend that the Department should set NXGH's labor consumption to the highest value reported for any Jacobi supplier.

Jacobi argues in its rebuttal brief that its five unaffiliated suppliers cooperated to the best of their ability by providing all FOP information as requested by the Department, referring to Jacobi's FOP submissions on the record. Jacobi further asserts that NXGH and DTHB were fully cooperative at verification. Jacobi argues that none of its suppliers withheld information and any inability to provide information was due to the method in which its ordinary books and records

were kept. Jacobi further argues that when records were not available for electricity consumption, NXHH provided its best estimate based on their experience with a full explanation. *See* Jacobi Supp at Exhibit Q#52. Jacobi argues that the application of AFA is not warranted.

Department's Position:

We disagree with Petitioners' allegations that the application of AFA is appropriate for Jacobi's suppliers' electricity consumption. Section 776(b) of the Act states "if the administering authority…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," the Department may apply an adverse inference. In the instant case, the Department has found that DTHB, DTHT, DTFH, and NXHH have acted to the best of their ability to comply with the Department's requests for information. *See also* Comments 8 and 11. Therefore, the application of an adverse inference is not appropriate. In addition, the Department found in the *Preliminary Determination*, 71 FR at 59727 that these suppliers' data were submitted by the deadline, potentially verifiable, and not so incomplete that it cannot be used. Petitioners' allegation that these suppliers' data are based on unsubstantiated estimates is unfounded. Jacobi has stated on the record that NXHH does not have meters that track production-specific consumption of electricity. *See* Jacobi Supp at 81-82. Because NXHH does not maintain these records, Jacobi constructed a reasonable alternative allocation methodology based on records maintained by NXHH, and provided examples of such records. We note that DTHT and DTFH did report that they track electricity at each stage of the production process, and that Jacobi has used these data in the calculation of its electricity consumption, contrary to Petitioners' contention. *See* Jacobi Supp at 61, 71 and Exhibits 90 and 105c.

Therefore, we find that DTHB, DTHT, DTFH, and NXHH have responded in the form and manner required to the Department's request for information. In addition, the Department did not elect to verify DTHT, DTFH, and NXHH's submitted data under section 782(i)(1) of the Act and, therefore, no new information has been placed on the record that would call into question the data submitted by Jacobi on behalf of DTHT, DTFH, and NXHH that would reverse the Department's decision in the *Preliminary Determination* to rely on these data. With respect to the issues raised by Petitioners related to DTHB and NXGH, *see* Comment 7.

In *Olympic Adhesives*, the court found that the Department's authority to apply facts available does not extend to situations in which the information or data requested is not able to be produced because these data do not exist. *See Olympic Adhesives*, 899 F. 2d at 1565,1572-3. In addition, the court has noted in *Nippon Steel*, 337 F. 3d at 1373, that the Department must find that a reasonable respondent "would have known that the requested information was required to be kept and maintained" in order to apply an adverse inference. *See Nippon Steel*, 337 F. 3d at 1382-1383. As Jacobi based the electricity consumption by DTHB, DTHT, DTFH, and NXHH on information they maintained in the ordinary course of business, we find that Jacobi has acted to the best of its ability to provide the requested information with respect to DTHB, DTHT, DTFH, and NXHH, and the application of facts available is inappropriate. As such, the Department will rely on the FOP data for electricity submitted by Jacobi on behalf of DTHB, DTHT, DTFH, and NXHH in calculating normal values for the final determination. However, the Department notes that Jacobi's suppliers have been on notice since the issuance of the

Department's questionnaire that the Department requires complete verifiable records, and in future proceedings will be required to present accurate and verifiable records. *See Nippon Steel*, 337 F. 3d at 1382-1383. With respect to NXGH, the Department has determined that NXGH's FOPs were unverifiable, and for the final determination the Department has determined to apply AFA to Jacobi with respect to products sourced from NXGH. *See* Comment 7, above.

Comment 12: Treatment of Impregnated Material at NXGH for which No Data Were Reported

Petitioners argue in their case brief that NXGH did not provide product-specific input information for certain impregnated products. *See also* Comment 7. Petitioners argue that this information is critical FOP information for these products that were missing from the record of the investigation. Petitioners argue that because the Department was unable to further pursue the matter (*see* Memorandum to the File: Verification of the Factors Response of Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc. in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated December 27, 2006 ("NXGH Report") at 21), the Department should apply FA under 19 U.S.C. §§ 1677e(a)(1) and (2)(D). Petitioners further contend that if the Department does not apply total AFA to Jacobi, it should apply, as AFA, the highest margin used as the PRC-wide rate (228.11% in the *Preliminary Determination*) for all U.S. sales of NXGH impregnated activated carbon, and also apply this margin to all impregnated material regardless of source because, Petitioners assert, NXGH represented the only source of impregnated material that the Department attempted to verify.

Jacobi argues in its rebuttal brief that NXGH reported these data which NXGH considered a trade secret in its September 15, 2006 submission, and submitted this information under APO rebracketed on October 3, 2006.

Department's Position:

The Department has determined that NXGH's FOPs were unverifiable, and for the final determination the Department has determined to apply AFA to Jacobi with respect to products sourced from NXGH, and Petitioners' and Jacobi's arguments in this regard are moot. *See* Comment 7, above. As discussed above, as AFA, the Department has determined to use the weighted average of the two highest CONNUM-specific calculated normal values from any supplier of CCT or Jacobi to the sales of merchandise manufactured by NXGH, and therefore NXGH's impregnated products' FOPs will not be used for the final determination. With respect to Petitioners' allegations that NXGH's verification findings should be imputed to other data in Jacobi's FOP database, *see* Comment 13, below.

Comment 13: Whether to Impute Verification Findings of NXGH and DTHB to Jacobi's Other Suppliers

Petitioners argue in their case brief that, if the Department does not apply total AFA to DTHB and NXGH or to Jacobi as a whole, the Department should impute any partial FA used for DTHB and NXGH to all other Jacobi suppliers. Petitioners assert that if the Department uses the

highest reported FOP as FA for any unverified FOPs or application of the FA pondered by Petitioners for surrogate values in Comments 16-18 for DTHB and NXGH, the Department should apply those FOPs or surrogate values to all suppliers of Jacobi. Petitioners aver that the alleged failure of both of the suppliers at verification should be imputed to all suppliers. Petitioners also argue that if the Department determines that it is appropriate to calculate margins for Jacobi, the FOPs for all suppliers should be increased by the ratio between the originally reported percentage of purchased CARBMAT reported by NXGH and the ratio reported at verification.

Jacobi did not comment on this issue.

Department's Position:

The Department disagrees with Petitioners that the Department should impute the findings of NXGH and DTHB to Jacobi's other unaffiliated suppliers as there is no evidence on the record to suggest that the results of the verifications of NXGH and DTHB would be comparable to the results of verification at Jacobi's other suppliers. Indeed, the findings at NXGH and DTHB themselves were substantially and materially different. *See* NXGH Report and DTHB Report. Additionally, we note that Jacobi's other suppliers, DTHT, DTFH, and NXHH supplied unique Section D responses and FOP databases to the Department, with distinct product codes and production processes. *See* Jacobi Section C&D. In the *Preliminary Determination* the Department calculated Jacobi's margin using the information provided by DTHT, DTFH, and NXHH (except as noted in Jacobi Prelim Analysis Memo). No new information has been placed on the record with respect to these entities since the *Preliminary Determination*. Moreover, Petitioners have cited no legal authority or precedent to support their request that the Department impute the findings from the verification of NXGH and DTHB to other suppliers. Therefore, we decline to impute the findings from NXGH and DTHB's verifications to Jacobi's other unaffiliated suppliers.

Comment 14: Treatment of Water

Petitioners argue in their case brief that, because DTHB's water consumption figures for steam activation, acid washing, and water washing were based on estimates (*see* Jacobi Supp at 51), the Department should apply AFA to DTHB's water consumption. Petitioners assert that NXGH's water consumption figures for steam activation, acid washing, and water washing were also based on estimates from an uncertain time period (*see* Jacobi Supp at 97), with no supporting documentation. Petitioners further argue that DTHT has also not reported actual water consumption for steam activation and has instead reported an estimated value due to a broken water meter. *See* Jacobi Supp at 60. Petitioners contend that this is inconsistent with NME methodology and allege that DTHT has no actual production records to support the 2002-2003 values used. Petitioners further assert that DTFH's reporting of water consumption based on estimates because it does not have water meters and did not keep records, indicates that there is no means to verify the values reported. *See* Jacobi's Supp at 69. Petitioners also argue that NXHH has not reported actual water consumption for steam activation, and has instead reported an estimate based on experience without supporting documentation (*see* Jacobi Supp at 77), and

there are no records to verify the reported water consumption rate.[35] Petitioners argue that reporting of water consumption based on estimates is inappropriate in an NME analysis.

Petitioners argue that the Department should apply AFA to all of Jacobi's suppliers' water consumption. As AFA, Petitioners contend that the Department should set the water consumption for all suppliers to the highest value reported for any Jacobi supplier. Petitioners argue that the supplier with the highest consumption also has unsupported data, which should be taken into account when applying this factor. Petitioners further argue that the problematic data would result in faulty data being applied to unverifiable data, indicating that Department should apply total AFA.

Jacobi argues in its rebuttal brief that its five unaffiliated suppliers cooperated to the best of their ability by providing all FOP information as requested by the Department, referring to Jacobi's FOP submissions on the record. Jacobi further asserts that NXGH and DTHB were fully cooperative at verification. Jacobi argues that none of its suppliers withheld information and any inability to provide information was due to the method in which its ordinary books and records were kept. Jacobi further argues that when records were not available for water consumption, DTHB, NXHH, and NXGH provided their best estimate based on their experience with a full explanation. *See* Jacobi Supp at 51, 77, 80, 96, and Exhibit Q#52. Jacobi argues that the application of AFA is not warranted.

Department's Position:

The Department agrees with Jacobi that AFA is not warranted with respect to DTHB, DTHT, DTFH, and NXHH's water consumption.

Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act provides that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title. Section 782(e) of the Act also provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (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 in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

[35] Petitioners note that NXHH refers to Jacobi Supp at Exhibit Q#125b for supporting documentation but that this exhibit was not included in the supplemental.

In the case of water consumption, the Department found in the *Preliminary Determination*, 71 FR at 59727 that "Jacobi has constructed an allocation methodology based on records maintained by each of its suppliers." In addition, the Department noted that Jacobi's suppliers' submitted data were submitted by the deadline, potentially verifiable, and not so incomplete that they cannot be used. *Id.* Jacobi submitted detailed narratives on the reporting methodologies of each of its suppliers' water consumption. Specifically, Jacobi noted that its suppliers did not maintain production records for actual water consumption. *See, e.g*, Jacobi 2nd Supp at 51 and 60. Further, at verification, the Department confirmed that no water meters were on site and that the boilers themselves listed the capacity, which tied to the response. *See* DTHB Report at 7.

Because Jacobi's suppliers do not have water meters or maintain water consumption records for the POI that would allow the suppliers to report the POI-specific water consumption, Jacobi constructed a reasonable alternative allocation methodology based on the capacities of the boilers, as well as providing examples of the non-consumption-specific fees incurred by the suppliers in the ordinary course of business. *See* Jacobi 2nd Supp at Exhibits 75-1 and 105a. Therefore, the Department finds that with respect to water consumption, DTHB, DTHT, DTFH, and NXHH responded in the form and manner requested to the Department's request for information. In addition, the Department did not elect to verify DTHT, DTFH, or NXHH's submitted data under section 782(i)(1) of the Act and, therefore, no new information has been placed on the record that would call into question the data submitted by Jacobi on behalf of these suppliers that would reverse the Department's decision in the *Preliminary Determination* to rely on these data.

In *Olympic Adhesives*, the court found that the Department's authority to apply facts available does not extend to situations in which the information or data requested is not able to be produced because these data do not exist. *See Olympic Adhesives*, 899 F. 2d at 1572-3. In addition, the court has noted in *Nippon Steel*, that the Department must find that a reasonable respondent "would have known that the requested information was required to be kept and maintained" in order to apply an adverse inference. *See Nippon Steel*, 337 F. 3d at 1382-1383. As Jacobi's suppliers DTHB, DTHT, DTFH, and NXHH do not maintain water meters or track water consumption in their ordinary course of business, and these entities based their consumption figure on information it did maintain in the ordinary course of business, we find that Jacobi has acted to the best of its ability to provide the requested information with respect to DTHB, DTHT, DTFH, and NXHH, and the application of facts available is inappropriate. As such, the Department will rely on the water consumption data submitted by Jacobi on behalf of DTHB, DTHT, DTFH, and NXHH in calculating normal values for the final determination. However, the Department notes that Jacobi's suppliers have been on notice since the issuance of the Department's questionnaire that the Department requires complete verifiable records, and in future proceedings will be required to present accurate and verifiable records. *See Nippon Steel*, 337 F. 3d at 1382-1383. With respect to NXGH, the issue is moot since the Department has determined to apply total AFA to all of NXGH's FOPs. *See* Comment 7, above.

Comment 15: Treatment of Packing and Factory Labor

Petitioners argue that NXGH, DTHT, and DTFH's packing labor FOP includes both sieving and packing labor. *See* Jacobi Supp at 63, 73-74, and 100-101. Petitioners argue that NXGH also failed to verify packing labor due to lack of preparation and therefore should be subject to partial AFA. However, Petitioners argue that, if AFA is not deemed appropriate for the final determination and a margin is calculated for Jacobi, no basis for allocating packing versus sieving labor has been placed on the record for NXGH, DTHT, or DTFH. Petitioners assert that the combined processing and packing labor included in "PACKLAB" should be included in cost of manufacturing ("COM"), prior to the application of any financial ratios because packing labor is not separately identified for these suppliers.

Jacobi did not comment on this issue.

Department's Position:

While it is the Department's standard practice to not add packing costs (including packing labor) to COM (*see Diamond Sawblades Final*, and accompanying Issues and Decision Memorandum at Comment 9), as discussed in the *Preliminary Determination* and the accompanying Memorandum to the File: Jacobi Carbons AB, Tianjin Jacobi International Trading Co., Ltd., and Jacobi Carbons, Inc.: Program Analysis for the Preliminary Determination, dated October 4, 2006, the Department found that because Jacobi's suppliers DTHT, DTF, and NXGH do not distinguish between processing labor and packing labor in its normal books and records, and that sieving workers also work as packing workers, and because suppliers included in the reported "PACKLAB" the consumption of both processing labor and packing labor, the Department included the reported PACKLAB of DTHT, DTF, and NXGH as part of COM.

Jacobi has placed on the record no new information which would enable the Department to distinguish processing and packing labor for DTHT, DTF, or NXGH. Therefore, because the Department is unable to distinguish packing labor from the processing labor (properly included in COM), the Department continues to find for the final determination that DTHT and DTF's PACKLAB should be included as part of COM. With respect to NXGH, the issue is moot since the Department has determined to apply total AFA to all of NXGH's FOPs. *See* Comment 7.

Comment 16: Valuation of Carbonized Material

Petitioners argue that DTHB's description of bituminous CARBMAT is flawed. Petitioners argue that the CARBMAT used by DTHB is significantly pre-processed for activation as it is carbonized and sieved and has a low sulphur and ash content. *See* DTHB Report at 7. Petitioners further argue that DTFH has not provided a meaningful description of CARBMAT and that DTFH's statement that CARBMAT was carbonized non-metallurgical grade bituminous coal is unsupported. *See* Jacobi Supp at 67. Petitioners contend that because there is no clear explanation of the type of material used (*i.e.*, unprocessed charcoal, washed charcoal, etc.), the highest value on the record for this input should be used to value CARBMAT. Petitioners argue that the Department found at verification that DTHB uses significantly preprocessed CARBMAT, made from carbonized and sieved bituminous coal with a low sulfur and ash

content, and this finding should be imputed to DTFH. *See* DTHB Report at 7. Petitioners argue that if total AFA is not applied to Jacobi, the Department should value Jacobi's bituminous CARBMAT used by DTHB and DTFH as Rs. 19.40894 per kg, the surrogate value from Indian imports of bituminous coal inflated by the ratio between Indo German Carbons' raw material and carbonized material, because bituminous CARBMAT has been charred and sieved. *See also* Petitioners' Case Brief at 26-27 and Petitioners' August 10, 2006 surrogate value submission at 19-20 & 25 n.34.

Petitioners also argue that because NXGH's inventory of anthracite CARBMAT is of varying diameters, density, ash content, water content and evaporation percent (*see* NXGH Report at 8-9), the record demonstrates that NXGH did not report accurately the type of purchased anthracite carbonized material. *Id.* Petitioners argue that NXGH's self-produced CARBMAT uses washed anthracite coal and the Department should assume that the purchased anthracite CARBMAT is also washed. Petitioners argue that if the Department uses NXGH's FOP data to calculate a margin the Department should use, as the anthracite CARBMAT surrogate value, Rs. 21.766 per kg, which is the anthracite coal surrogate value inflated by the ratio between Indo German Carbons' raw material and carbonized material. *See also* Petitioners' Case Brief at 27-28 and Petitioner's September 8, 2006, submission at 8-9.

Petitioners further argue that NXGH's coconut CARBMAT is of a quality that indicates that it is further processed CARBMAT. *See* Jacobi Supp at 91-92. Petitioners further argue that the Department should use Rs 12.4496 per kg as the surrogate value for this material, which is the charcoal value from Indian Import Statistics. Petitioners also contend that at verification, NXGH was unable to verify whether coconut shell charcoal and anthracite were combined, as NXGH assumed the amount of anthracite based on the coconut CARBMAT used. *See* NXGH Report at 21. Petitioners argue that NXGH has not fully demonstrated the appropriate valuation for coconut CARBMAT, and therefore the Department should value coconut CARBMAT at Rs. 41.832 per kg., which is processed CARBMAT at an intermediate stage of production. *See* Petitioners' August 10, 2006, submission at 23-24.

Jacobi did not comment on this issue.

Department's Position:

The Department disagrees with Petitioners that the Department should value Jacobi's CARBMAT by inflating the surrogate value from Indian imports of coal by the ratio between Indo German Carbons' raw material and carbonized material, but agrees that coconut shell charcoal should be used to value coconut CARBMAT, and will continue to value all CARBMAT consumed by respondents using Indian HTS number 44020010: COCONUT SHELL CHARCOAL.

As an initial matter, we do not find, contrary to Petitioners' assertion, that Jacobi has provided no clear explanation of CARBMAT used by its suppliers. Jacobi has provided detailed explanations as to what CARBMAT is and how it is used by its suppliers, stating that it is "coal based products that are produced after volatilization…and carbonization." *See* Jacobi's 2nd Supp at 47-48 (DTHB); *see also* 57-58 (DTHT), 67 (DTFH), and 90-92 (NXGH). In addition, the

Department examined this issue at verification and found that CARBMAT as used by the industry in the PRC is coal or coconut shells that have been heated and carbonized using a furnace, and observed this process at Pingluo Xuanzhong Activated Carbon Co., Ltd. ("XZ"). *See, e.g*, Memorandum to the File: Verification of the Factors Response of Calgon Carbon Tianjin Co., Ltd. and Calgon Carbon Corporation in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated December 1, 2006 ("XZ Report") at 7. We note that there is no evidence on the record of this investigation that the CARBMAT used by respondents is significantly more processed than the surrogate value selected in the *Preliminary Determination*.

Section 773(c)(1)(B)(2) of the Act states that the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority. We find that the surrogate value used by the Department in the *Preliminary Determination* to value CARBMAT continues to represent the best available information on the record for establishing dumping margins as accurately as possible.

When selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a publicly available value which is (1) an average nonexport value; (2) representative of a range of prices within the POI or most contemporaneous with the POI; (3) product-specific; and (4) tax-exclusive. *See Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China*, 69 FR 67304 (November 17, 2004), and accompanying Issues and Decision Memorandum ("*CVP Decision Memorandum*"), at Comment 3. In applying the Department's surrogate value selection criteria as mentioned above, the Department has found in numerous NME cases that the import data from Indian World Trade Atlas ("WTA") represents the best available information for valuation purposes because it is an average import price, representative of prices within the POI, product-specific and tax-exclusive. In the instant case, as discussed in the *Preliminary Determination*, the Department found that the "coconut shell charcoal value, although not identical to the coal-based carbonized material used by respondents, is comparable in that both products are a type of charcoal." *See* Memorandum to the File: Certain Activated Carbon from the People's Republic of China: Surrogate Values for the Preliminary Determination, dated October 4, 2006 ("Prelim Surrogate Value Memo") at 6. The Indian Import Statistics data for HTS code 44020010: COCONUT SHELL CHARCOAL is an average value of multiple transactions, contemporaneous to the POI, comparable to the coal CARBMAT (and appears to be specific to coconut CARBMAT) used by the respondents in this investigation, and tax-exclusive.

Further, the Department noted in the *Preliminary Determination* that "under Petitioners' suggested methodology, the import values for the input coal would be adjusted by more than 300 percent. However, evidence placed on the record by Petitioners in their petition does not support that such a large difference exists between the cost of coal and charcoal. *See* Petition at Exhibit 14. Petitioners have placed no information on the record that would indicate that the application of an adjusted Indian Import Statistics value, using the financial statements of Indo German Carbons, would yield a more specific surrogate value, and indeed Petitioners' suggested value appears to be aberrational and unrepresentative of Petitioners' own data. While the Indian

Import Statistics value is contemporaneous, comparable to the input in question, and includes multiple transactions, making it representative of prices in India during the POI, the Indo German Carbons inflator in this case is from only one company. Further, there is no information on the record to demonstrate that Indo German Carbons' internal valuation of an intermediate input is washed or sieved, nor that the Indian Import Statistics value is not. Therefore, because the value from Indian Import Statistics data for HTS code 44020010: COCONUT SHELL CHARCOAL is the best available information, we find that the continued use of this surrogate value for all CARBMAT reported by the respondents in the final determination is appropriate.

With respect to NXGH, the issue is moot since the Department has determined to apply total AFA to all of NXGH's FOPs. *See* Comment 7, above. In addition, as discussed in detail elsewhere in this memorandum, we do not find that it is appropriate to impute verification findings from one supplier to another. *See* Comment 13, above.

Comment 17: Valuation of Coal

Jacobi argues in its case brief that the Department should use the surrogate value for coal from the United States submitted by Jacobi in its July 25, 2006, submission at Exhibit 1 to value coal for the final determination. Jacobi contends that although it is the Department's practice to select surrogate values from a country with comparative economic development to the PRC, the facts of the instant investigation are unique and justify a different surrogate value selection process. Jacobi argues that the U.S. coal price is relevant to the instant investigation because the largest respondent in this case is affiliated with one of the largest production facilities in the United States, which presumably uses U.S. coal. Jacobi alleges that the U.S. price for coal therefore more accurately represents the price of coal used by respondents in this investigation. Jacobi further argues that the coal surrogate value used by the Department in the *Preliminary Determination* represents import prices of coal that is of a different type than that used by respondents. Therefore, Jacobi argues, the Department should use the U.S. coal price as the surrogate value for coal.

Petitioners argue in their rebuttal brief that the U.S. coal prices proposed by Jacobi are not from the surrogate market of India, are from a period after the POI, and pertain to coal prices from one region and one Btu classification. Petitioners further contend that Jacobi's request that these data be used to value coal is insufficiently specific by not specifying whether it should be used to value energy coal, all unprocessed coal direct material inputs, or carbonized coal. Petitioners argue that thermal coal is not an appropriate surrogate for valuing direct material coal or CARBMAT. Petitioners assert that metallurgical coal is the appropriate surrogate for activated carbon production due to its lower ash, moisture, and volatile content. Petitioners argue that if CARBMAT is actually bituminous coal, the appropriate surrogate value is bituminous coking coal from Indian Import Statistics. Petitioners further contend that the record demonstrates that DTHB, DTHT, and DTFH's coal inputs have undergone carbonization, making U.S. thermal coal an inappropriate surrogate. Petitioners also contend that the use of any coal or CARBMAT surrogate value is inappropriate for NXGH due to its failure at verification. *See* Comment 7. Moreover, Petitioners argue that the data placed on the record on January 11, 2007, by Jacobi does not incorporate the minor corrections for self-produced carbonized material and purchased carbonized material for NXGH for all products as requested by the Department, and only

includes changes for one product. Petitioners contend that the use of revised surrogate values is moot as the errors in the data submitted are so pervasive.

Department's Position:

The Department agrees with Petitioners that the Department should continue to value coal using Indian Import Statistics. We note that Jacobi does not specify in its case brief to which type of coal its proposed surrogate value should be applied. Therefore, the Department has relied on Jacobi's July 25, 2006, submission, where it referred to the U.S. price as "energy coal."

Section 773(c)(1)(B)(2) of the Act states that the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority. We find that the surrogate values used by the Department in the *Preliminary Determination* to value energy coal utilized by respondents continues to represent the best available information on the record for establishing dumping margins as accurately as possible.

When selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a publicly available value which is (1) an average nonexport value; (2) representative of a range of prices within the POI or most contemporaneous with the POI; (3) product-specific; and (4) tax-exclusive. *See CVP Decision Memorandum,* at Comment 3. The Department valued energy coal using HTS 27011920, based on price data obtained from publicly available import prices from the World Trade Atlas, derived from Indian Import Statistics in the *Preliminary Determination. See also* Prelim Surrogate Value Memo. In applying the Department's surrogate value selection criteria as mentioned above, the Department has found in numerous NME cases that the import data from WTA represents the best information available for valuation purposes because it is an average import price, representative of prices within the POI, product-specific and tax-exclusive.

In the instant case we continue to find that Indian Import Statistics is the best source for valuing the energy coal used by respondents. As an initial matter, we note that the Department has determined that India is the appropriate surrogate country to use in this investigation. *See* Memorandum to James C. Doyle, Director, AD/CVD Operations, Office 9, from Anya Naschak, Senior Case Analyst, through Carrie Blozy, Program Manager: Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China: Selection of a Surrogate Country ("Surrogate-Country Memo"), dated October 4, 2006. Consistent with recent determinations involving NME countries, the Department chose the publicly available information from its surrogate country, India, when available and appropriate, to value the FOPs. We note that the surrogate value suggested by Jacobi is not from the surrogate country, India, nor is the United States on the list of comparable countries to the PRC, nor are the U.S. data contemporaneous to the POI. *See* Jacobi's July 25, 2006, submission at Exhibit 1. We also note that although Jacobi claims that the type of coal included in HTS 27011920 is a different type of coal than that used by Jacobi, information on the record of this proceeding indicates that Jacobi's suppliers use steam coal (*see* Jacobi 2nd Supp at 35), and HTS 27011920 is described as steam coal (*see* Prelim Surrogate Value Memo at Attachment 3), making HTS 27011920 specific to the raw material reported by Jacobi. The data from Indian Import Statistics are from the surrogate

country, are contemporaneous and tax-exclusive, and contain many transactions, and Jacobi has placed no new information on the record which calls into question the data used in the *Preliminary Determination*. Therefore we find that the Indian Import Statistics for energy coal is representative of prices in India, and is the best source for valuing energy coal on the record of this investigation, and have continued to rely on these data for the final determination.

With respect to NXGH, the Department has determined that NXGH's FOPs were unverifiable, and for the final determination the Department has determined to apply AFA to Jacobi with respect to products sourced from NXGH. *See* Comment 7, above.

Comment 18: Valuation of Chemical Inputs

Jacobi argues in its case brief that the Department should adjust the surrogate values for chemical inputs reported by Jacobi's suppliers to reflect the actual purity level of those chemicals. Jacobi contends that the Department has always adjusted surrogate values to reflect purity levels and therefore, for the final determination, the Department should do so here. Jacobi provided a chart in its case brief at 15 noting the various chemicals and their purity levels. *See also* Jacobi Section C&D; Jacobi Supp.

Jacobi also argues that the Department should value Jacobi's inputs of Potassium Iodide ("KI") and Potassium Permanganate ("KMnO4") using Indian Import Statistics, rather than *Chemical Weekly*. Jacobi argues that the Department's practice is to use Indian Import Statistics when the data are not aberrational, but that it is not required to use the same source used in prior reviews. *See, e.g, Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China*, 69 FR 67304 (Nov. 17, 2004); *Rhodia, Inc. v. United States*, 185 F. Supp. 2d 1343, 1351-52 (CIT 2001). Jacobi contends that the *Chemical Weekly* data used by the Department in the *Preliminary Determination* are from only one city in India, Mumbai, making them unrepresentative of industry-wide prices in India during the POI. Jacobi avers that it is the Department's practice to use prices that are specific, net of taxes and import duties, contemporaneous, and publicly available. Jacobi argues that the *Chemical Weekly* data are less appropriate because they contain sales and excise taxes, and the Department should use the more appropriate data for the final determination and use Indian Import Statistics.

Petitioners argue that the chart, provided by Jacobi in its case brief at 15 in support of its argument that the Department should adjust the concentration of chemicals consumed by its suppliers, is unsupported. Petitioners argue that the underlying factor data were unverified, and DTHB and NXGH failed verification of all chemical inputs. *See* 19 U.S.C. § 1677m(i); DTHB Report at 14-16; NXGH Report at 21. Petitioners contend that record evidence does not support whether Jacobi's suppliers withdrew from inventory chemicals in pure or diluted concentrations. Petitioners further argue that DTHB delayed verification such that the Department was unable to verify any chemical consumption, and NXGH refused to report all of the chemicals it consumed and the Department was unable to verify chemical consumption. *See* DTHB Report at 14-16; NXGH Report at 21. Petitioners argue that DTHB and NXGH's failure to verify chemical composition should be imputed to the other suppliers, and, Petitioners assert, unverified information should not be used to adjust the data. Petitioners further allege that making the requested adjustments would have a significant impact on the calculations, and the data included

on the chart also do not tie to the Jacobi responses. *See* Petitioners' rebuttal brief at 13. Petitioners contend that the quantitative and qualitative chemical data are unreliable.

With respect to the valuation of KI and KMn04, Petitioners argue that *Chemical Weekly* is a national trade magazine for the chemical industry in India, representing India's major chemical markets. Petitioners also assert that Mumbai is the largest chemical market in India, making Mumbai prices representative of the national market. Petitioners also argue that the Department ordinarily removes sales and excise tax when necessary, and the surrogate values applied in the *Preliminary Determination* are net of tax. Petitioners contend that the Department prefers domestic prices when they are representative of national prices, can be made to be net of tax, and are specific to the input in question, making the *Chemical Weekly* prices better than that of Indian Import Statistics. Petitioners also argue that NXGH's chemical inputs should not be valued as they were not reported in a complete and accurate manner, and the Department found at verification that NXGH used chemicals that were not reported to the Department. *See* NXGH Report at 21. Petitioners allege that the complete FOPs for NXGH's impregnated products cannot be established and the application of FA is appropriate. *See* 9 U.S.C. §§ 1677e(a)(1), and (2)(C)-(D). Petitioners contend that the application of AFA is appropriate because Jacobi intentionally withheld necessary chemical input information.[36]

Department's Position:

The Department agrees with Petitioners that *Chemical Weekly* is the most appropriate source for valuing KI and KMnO4.

Section 773(c)(1)(B)(2) of the Act states that the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority. We find that the surrogate values used by the Department in the *Preliminary Determination* to value KI and KMnO4 continue to represent the best available information on the record for establishing dumping margins as accurately as possible.

When selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a publicly available value which is (1) an average nonexport value; (2) representative of a range of prices within the POI or most contemporaneous with the POI; (3) product-specific; and (4) tax-exclusive. *See CVP Decision Memorandum,* at Comment 3. The Department valued certain factors based on price data obtained from the Indian publication *Chemical Weekly*, which represent prices available in the Indian domestic market, in the *Preliminary Determination*. *See also* Prelim Surrogate Value Memo. In applying the Department's surrogate value selection criteria as mentioned above, the Department has found in numerous NME cases that the import data from *Chemical Weekly* represents reliable information for valuation purposes because it represents multiple prices over time, is representative of prices during the POI in India, is product-specific, and can be made tax-exclusive. *See, e.g.*, *Polyvinyl Alcohol from the People's Republic of China: Preliminary Results of Antidumping Administrative Review*, 70 FR 67434 (November 7, 2005), unchanged in *Polyvinyl Alcohol from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71

[36] *See Shanghai Taoen*, 360 F. Supp. 2d at 1345; *Nippon Steel*, 337 F. 3d at 1383.

FR 27991 (May 15, 2006); *Persulfates from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 46476 (August 10, 2005), unchanged in *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 7725 (February 14, 2006).[37]

In the instant case, we find that *Chemical Weekly* is the best source for valuing the inputs of KI and KMnO4. We note that the data from *Chemical Weekly* are contemporaneous, and specific to the chemicals in question. In addition, we note that Jacobi's assertion that these data were from Mumbai only is incorrect (*see* Prelim Surrogate Value Memo at Attachment 4). We note that KI includes prices from both Mumbai and Hyderabad, and KMnO4 includes prices from Bangalore, Chennai, and Delhi. Therefore, the *Chemical Weekly* data used include multiple transactions from multiple markets, making them representative of prices in India. These data have also been made tax exclusive. In addition, we note that the Indian Import Statistics data for the POI of KI and KMnO4 consist of only one transaction, making it less likely to be representative of India-wide prices, and therefore *Chemical Weekly* is a better source.

With respect to the adjustment requested by Jacobi to the surrogate values, the Department notes as an initial matter that the chart supplied by Jacobi ties to their response, and therefore was not new information and was subject to verification. We agree with Jacobi that the Department adjusts for chemical purity when the surrogate value is sourced from *Chemical Weekly* when the facts of the case support such an adjustment, and where there is adequate reliable information to do so. *See CVP Decision Memorandum*, at Comment 5. However, the Department does not adjust for chemical purity when the "surrogate value sources do not indicate levels of purity which can be used for comparison purposes." *Id*. Therefore, with respect to sodium hydroxide, potassium hydroxide, phosphoric acid, potassium carbonate, and magnesium, no adjustment is necessary, as these chemicals are sourced from Indian Import Statistics, and Jacobi has placed on the record no information that would indicate the chemical purity of these data.

With respect to the chemicals hydrochloric acid, KI, and KMnO4, the Department notes that, in the *Preliminary Determination*, it did in fact adjust the surrogate value by the chemical purity consistent with the Department's practice. *See* Jacobi Prelim Analysis Memo at Attachment III. The Department used a simple average of the chemical purities reported by Jacobi's suppliers. *Id*. With respect to Petitioners' allegation that the Department should not adjust for the chemical concentration for DTHB, the Department notes that the chemical concentrations for all suppliers, including DTHB, are on the record (*see* Jacobi 2nd Supp at Exhibit 46), and were used in the *Preliminary Determination*. Further, the Department discovered no new information at verification that would call into question the concentrations reported. Therefore, the Department will continue to use these values for the final determination. The Department agrees with Jacobi that it inadvertently omitted the purity level of KI used by NXGH in the *Preliminary Determination*. However, the Department has determined, for the final determination, to not include NXGH's chemical purities to the chemicals valued using *Chemical Weekly*. The

[37] The Department adjusted the average value to exclude excise tax in each case where the price was specifically identified as being inclusive of excise tax or solely inclusive of excise tax, as appropriate. Based on the 16 percent excise tax identified in *Central Excise Tariff 1998-99* (as published by Cen-Cus Publications, New Delhi), we calculated tax-exclusive prices in the *Preliminary Determination*, and have continued to do so for the final determination. *Id*.

Department notes that it is applying total AFA to the FOPs of NXGH (*see* Comment 7), therefore, the Department will remove the chemical purities supplied by NXGH from the averages applied. However, the Department will continue to apply an average of the purity levels used by DTHB, DTHT, and NXHH for the inputs of hydrochloric acid, KI, and KMnO4.

In addition, the Department notes that it found inadvertent errors in its calculation of the surrogate value for hydrochloric acid, KI, and KMnO4. Specifically, the Department incorrectly included null values in its average POI price net taxes. *See* Prelim Surrogate Value Memo. Therefore, for the final determination, the Department has excluded these null values from its surrogate value calculation. For a printout of the revised calculation, *see* Jacobi Final Analysis Memo and CCT Final Analysis Memo.

Comment 19: Calculation of Indirect Selling Expense

Petitioners argue that the Jacobi US Report confirms that Jacobi has understated U.S. indirect selling expenses ("ISE"), including an underreporting of SG&A expenses based on Jacobi's profit and loss statement. *See* Jacobi Section C&D at Exhibit C-1 and Jacobi Supp at Exhibit Q#42b. Petitioners also contend that Jacobi improperly excluded "Extraordinary Expense," which was related to movement of a factory (*see* Jacobi US Report at 16), from the numerator of Jacobi's ISE calculation and, Petitioners argue, these expenses should more appropriately be included. Petitioners argue that the Department's test to determine whether costs are extraordinary is based solely on how the subsidiary submitted the expenses to the parent company and the method by which costs are recorded must not distort actual costs. *See* 19 U.S.C. § 1677b(f)(1)(A). Petitioners also contend that costs should be adjusted for nonrecurring costs that benefit current or future production, or both. *See* 19 U.S.C. § 1677b(f)(1)(B). Petitioners also argue that charging Jacobi US for a portion of the cost to move a group production facility undermines the reliability of Jacobi US' statements as a whole if these costs did not benefit Jacobi US.

Petitioners further contend that the deductions made in the calculation of ISE are subject expenses with the exception of the category "rent for premises (non-JCI)." Petitioners assert that booking a cost on behalf of another company is a violation of GAAP as it is not related to its own operation and Jacobi US does not receive proceeds from that entity. Petitioners argue that if Jacobi US is cooperating with the company in an unrelated field, its total revenues should be deducted from Jacobi US's total income in the ISE denominator. Petitioners argue that because these accounting questions are unresolved, the rent paid by Jacobi US should be included in the numerator.

Petitioners also argue that Jacobi US' statement that the three individuals included on Jacobi US' profit and loss statement conduct no Jacobi US sales-related operations is unsupported by the record. Petitioners assert that Jacobi AB's involvement in U.S. sales operations is confirmed by Jacobi Supp at Exhibit Q#5 and at the verification of Jacobi AB. *See also* Jacobi AB Report at 3-4 and 6-7. Petitioners further argue that these individuals are located in the United States marketing and conducting research on behalf of Jacobi AB, and, Petitioners argue, all technical and manufacturing expenses should be applied to all Jacobi products. Petitioners argue that because these individuals' work involves subject merchandise, and is recognized as an ISE

expense by Jacobi US in the ordinary course of business, it should not be excluded from the ISE ratio. Petitioners futher argue that Jacobi's exclusion from the ISE ratio of intercompany interest above the cost of borrowing (*see* Jacobi Supp at 31-32) was improper. Petitioners argue that because Jacobi US incurred actual borrowing expenses, these expenses should be included in the ISE numerator, irrespective of whether the borrowings were made at arms-length. *See also* Jacobi US Report at 16. Petitioners also allege that Jacobi AB has an integral role in all aspects of U.S. sales transactions (*see* Jacobi AB Report at 6 and 11), and that these operations are U.S. economic activity. Petitioners argue that the salaries of certain Jacobi AB personnel, as well as fax, email and phone costs related to U.S. sales activity, should be allocated to U.S. sales. *Id.* Petitioners argue that these expenses are not general corporate expenses but are directly related to the sales at issue.

Petitioners further contend that Jacobi improperly included non-subject merchandise from the denominator of the ISE ratio because those expenses were excluded from the numerator. Petitioners argue that either only subject sales income should be included in the denominator or non-subject expenses should be included in the numerator to create an apples-to-apples comparison. Petitioners propose an alternate calculation of the ISE ratio in their case brief at 30.

Jacobi did not comment on this issue.

Department's Position:

The Department disagrees with Petitioners that "Extraordinary Expense", "non-JCI" and group expenses, and additional Jacobi AB expenses should be included in the numerator of Jacobi's ISE calculation. The Department agrees, however, with Petitioners that Jacobi's exclusion of "overcharged interest" was improper. In addition, while the Department agrees with Petitioners that both the numerator and the denominator of the ISE calculation should be on the same basis, we do not agree that Jacobi has improperly included non-subject merchandise in its ISE denominator.

As an initial matter, we note that Petitioners' claim that Jacobi has understated its SG&A expenses, referring to Jacobi Section C&D at Exhibit C-1 and Jacobi Supp at Exhibit 42b, is not relevant to Jacobi's ISE calculation. The Department notes that, on the Department's request, Jacobi revised its methodology for calculating its ISE factor in Jacobi 2nd Supp. *See* Jacobi 2nd Supp at Exhibit 12b. We find that Jacobi's ISE factor calculation properly reflects indirect selling expenses incurred in the United States, except as noted below.

In the *Preliminary Determination*, the Department excluded "Extraordinary Expense", "non-JCI" and group expenses, deducted intercompany interest overages, and included an amount for sales costs incurred in Sweden in the numerator of Jacobi's ISE calculation. *See* Jacobi Prelim Analysis Memo at 11-12. The Department has conducted a thorough verification of this issue in both the United States and in Sweden, and has determined that certain adjustments should be made to Jacobi's ISE calculation.

With respect to the extraordinary expenses reported by Jacobi, we note that the U.S. verification report states that " 'Extraordinary Expenses' was an expense allocated to all companies in the

Jacobi Group for movement of one of its factories, and has no relation to any U.S. operations." *See* Jacobi US Report at 16. Therefore, this expense is not an expense related to the production of Jacobi's sales of subject merchandise in the United States. Further, we note that the merchandise under investigation was sourced from a NME country, and therefore the actual costs of the producer or exporter are immaterial. Therefore, Petitioners' reliance on 19 U.S.C. § 1677b(f)(1)(A) and (B) is not on point to the calculation of ISE incurred in the United States and sourced from a NME country. In addition, we note that it is the Department's practice that "costs associated with the closure of facilities…should not be included in G&A expenses…{because}…The gains or losses on the routine disposal or sale of assets of this type relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations." *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 FR 73437 (December 12, 2005) and accompanying Issues and Decision Memorandum at Comment 8. Therefore, Petitioners' argument is inconsistent with the Department's regulations and precedent in this case, and the Department has continued to exclude this expense from the ISE calculation.

Section 351.402(b) of the Department's regulations states "the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale." Section 772(d)(1) of the Act further states that in making adjustments in CEP instances, the Department will deduct "the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added) (A) commissions for selling the subject merchandise in the United States; (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties; (C) any selling expenses that the seller pays on behalf of the purchaser; and (D) any selling expenses not deducted under subparagraph (A), (B), or (C)" (emphasis added).

In the instant case, we note that the Department found at verification that "non-JCI" expenses, included in Jacobi US' profit and loss statement were "expenses paid on behalf of…a company with which Jacobi shares office space." *See* Jacobi US Report at 16. Therefore, "non-JCI" expenses are clearly unrelated to the expenses incurred by Jacobi US on sales of subject merchandise, and by the plain language of section 772(d)(1) of the Act should be excluded. While Petitioners argue that the booking of these expenses is a violation of GAAP, Petitioners did not cite to any authority to support their claim, nor cite to any evidence on the record of this proceeding that would indicate that Jacobi is cooperating with this company in any way. In addition, irrespective of Petitioners' arguments to the contrary, the Department found that Jacobi US' books and records tie to its financial statements. *See* Jacobi US Report at 10. Accordingly, the Department has continued to exclude these non-selling expenses from its calculation of Jacobi's ISE.

With respect to group expenses booked in Jacobi US' financial records, the Department notes that, contrary to Petitioners' claim, the record supports Jacobi's assertion that these expenses are unrelated to Jacobi US' sales. Petitioners themselves acknowledge that these group expenses are related to the operations of Jacobi AB, rather than Jacobi US. *See* Petitioners case brief at 47. We note that the Department verified that "all "Group" expenses are expenses incurred

by…employees of Jacobi AB," and that Jacobi used "total ISE related to U.S. sales operations" in its calculation of the ISE factor. While Petitioners allege that these individuals' work is related to subject merchandise, the Department found no evidence that these individuals were in any way conducting U.S. sales, nor were they employees of Jacobi US. The Department has included expenses verified as directly attributable to subject sales and incurred by Jacobi AB in its calculation of constructed export price[38] (*see* Jacobi AB Report at 11), but the record does not support the conclusion that any additional expenses related to the sale of subject merchandise were incurred by Jacobi AB. Specifically, the Department notes that Jacobi itself, in its calculation of direct selling expenses, accounted for all expenses of all salespeople making sales on behalf of Jacobi US.[39] *See* Jacobi US Report at 16 and Exhibit 8. Further, the Department notes that in *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276, 1291 (CIT 2005), the court upheld the Department's decision to accept the respondent's inclusion of only those selling expenses associated with subject merchandise in ISE. Therefore, because the Department has verified that group and additional Jacobi AB expenses are unrelated to "selling the subject merchandise" (*see* section 772(d)(1) of the Act), the Department has continued to exclude these expenses from Jacobi's ISE numerator for the final determination.

With respect to the overcharged interest deducted by Jacobi from its ISE calculation, the Department agrees with Petitioners that this amount should not be deducted. Specifically we note that the Department relies on the books and records of a respondent, and in this case the books and records of Jacobi do not include any such downward adjustment in Jacobi US's incurred costs. In contrast, Jacobi US' books and records specifically includes an amount for interest. *See* Jacobi 2nd Supp at Exhibit 12b. The Department has therefore relied on the interest actually incurred by Jacobi US in calculating the ISE numerator, and will not deduct this "overcharged interest" from Jacobi's ISE numerator for the final determination.

Finally, with respect to Petitioners' allegations regarding Jacobi's ISE denominator, the Department does not find that Jacobi excluded any expenses in its numerator that would necessitate a modification of its denominator. Specifically, we note that, as discussed above, the record supports a finding that "group" expenses are unrelated to any sales activities in the United States by Jacobi US. The Department's verification of Jacobi US demonstrates that Jacobi reported in its ISE calculation "total ISE related to U.S. sales operations" in the numerator and "total sales" of Jacobi US' operations in the denominator. However, the Department notes that the minor correction reported for Jacobi's reported direct selling expenses of an underreporting of total U.S. 2005 sales value (*see* Jacobi US Report at 2), also applies to Jacobi's reported ISE ratio. Therefore, while we do not find that Petitioners' suggested adjustment is appropriate, we do find that the adjustment to the ISE denominator to account for all U.S. sales is appropriate for the final determination.

For the reasons discussed above, for the final determination, the Department finds that a revision of its *Preliminary Determination* calculation of ISE for Jacobi to no longer exclude "overcharged

[38] We note that the Department's recalculation of Jacobi's ISE factor in the *Preliminary Determination* double-counted this expense. The Department has corrected this error for the final determination. *See* Jacobi Final Analysis Memo.

[39] We note that in the *Preliminary Determination*, these expenses were more properly classified as ISE, and the Department will continue to do so for the final determination.

interest" and to make clerical changes to the Jacobi AB expense and to the denominator is appropriate, but that the other changes proposed by Petitioners are inappropriate. For a detailed calculation of these changes *see* Jacobi Final Analysis Memorandum.

CCT:

Comment 20: Whether to Continue to Apply Adverse Facts Available to Certain CCT Suppliers

CCT argues that in the *Preliminary Determination* the Department applied adverse facts available with respect to certain unaffiliated Chinese suppliers of subject merchandise sold in the United States during the POI for which CCT was unable to report factors of production even though CCT stated that it acted to the best of its ability to obtain the requested data and placed evidence on the record of its efforts. CCT contends that the Department erred in applying an adverse inference to data withheld by unaffiliated Chinese suppliers and requests that the Department eliminate such an inference for purposes of its final determination.

CCT maintains that it was unable to report FOP data for certain unaffiliated Chinese suppliers of subject merchandise sold in the United States during the POI. CCT claims that Ningxia Luyuanheng Activated Carbon Co., Ltd. ("HD") and Nuclear Ningxia Activated Carbon Co., Ltd. ("NC") were direct suppliers to CCT that refused to provide the requested FOP data to CCT. CCT further asserts that certain indirect suppliers whose products CCT purchased from Shanxi Xuanzhong Chemical Industry Co., Ltd. ("SXZ"), Huairen Jinbei Chemical Co., Ltd. ("JB") and Jiaocheng Xinxin Purification Material Co., Ltd. ("XX") also refused to provide the requested FOP data to CCT. CCT contends Ningxia Yinchuan Lanqiya Activated Carbon Co., Ltd. ("LQY"), Dushanzi Chemical Factory ("DSZ") and Xingtai Coal Chemical Co., Ltd. ("TX"), who CCT states are direct suppliers to CCT, were not asked to provide FOP data because Calgon Carbon Corporation was unable to determine that it had sold these suppliers' products in the United States during the POI until shortly before the preliminary determination.

CCT argues that the Department's authority to use adverse inferences in the selection of the facts available is limited to those circumstances where it is demonstrated that the interested party failed to cooperate by not acting to the best of its ability to comply with a request for information. CCT claims that two conditions must be met before the Department is permitted to apply adverse inferences in the selection of the facts available. CCT asserts that the Department must make an objective showing that a reasonable and responsible interested party would have been able to provide such information and a subjective showing that the interested party failed to cooperate by not maintaining records or failing to put forth maximum effort in acquiring such information. *See Nippon Steel*, 337 F.3d at 1382.

CCT argues that the respondent in this investigation is CCT and not the unaffiliated suppliers, and, therefore, the standard of cooperation should be based on CCT's actions and not those of the unaffiliated supplier. CCT cites several cases in which the courts have held that the Department cannot use an adverse inference unless it has been demonstrated that it failed to use maximum efforts in providing the Department with the requested information and that the Department must specifically state the manner in which the respondent failed to act to the best of its ability. *See,*

e.g., *Shandong Huarong Machinery Co., Ltd. v. United States*, 435 F. Supp. 2d 1261, 1272 (CIT 2006) and *Tianjin Machinery Import & Export Corp. v. United States*, 353 F. Supp. 2d 1294, 1305 (CIT 2004) (citing *Borden Inc. v. United States*, 4 F. Supp.2d 1221, 1246 (CIT 1998)). CCT argues that it did act to the best of its ability in providing the FOP data requested by the Department.

With respect to HD and NC, CCT asserts that CCT officials contacted HD officials numerous times at the outset of the investigation - by telephone, letter and in person - requesting HD's FOP data and that HD consistently refused to participate. CCT argues that prior to the initiation of the case, HD ceased production, laid off its entire production workforce, and shut down production facilities and equipment. CCT maintains that it attempted to contact HD several times via letters and phone calls, and a request for a meeting, after which HD still refused to cooperate with CCT and provide the necessary information.

CCT argues that, with respect to NC, CCT also made several attempts to obtain the supplier's cooperation. CCT contends that NC ceased production operations, laid off its entire workforce and shut down production facilities and equipment. CCT maintains that NC initially agreed to provide the necessary FOP data, but only gave CCT's Chinese counsel limited data and was told by NC's manager that the company would not cooperate any further. CCT asserts that it was told that NC's accountant had been laid off and the new owner of NC would not allow further participation with the investigation because he perceives the dumping investigation as having led to a shutdown of operations.

CCT argues that, with respect to SXZ and XX, it acted to the best of its ability to obtain the requested FOP data from the upstream unaffiliated producers of merchandise under consideration supplied by SXZ and XX that Calgon Carbon Corporation sold in the U.S. market during the POI. CCT argues that the upstream suppliers were unwilling to provide the FOP data despite its requests for the data requested by the Department.

CCT asserts that it is the "interested party" for purposes of applying section 776(b) of the Act. CCT contends that the suppliers are not "interested parties" within the meaning of Section 776 of the Act, as they have no direct commercial relationship with CCT and have no interest in, or intention to, supply the U.S. market, and as such cannot be the party for which adverse inferences may be based due to a refusal to respond to a data request from the Department.

With respect to LQY, DSZ and TX, CCT argues that it is inappropriate to apply AFA with respect to the U.S. sales of subject merchandise produced by these entities. CCT further argues that although some of the invoices to these suppliers were issued on, or about, the time the original Section D response was submitted to the Department, the Department is incorrect in inferring from this that CCT was in a position to include those sales in the initial questionnaire response submitted on July 10, 2006, thereby identifying the suppliers. CCT contends that it had to impose a cut-off point for the collection of data so that the company would have sufficient time prior to the questionnaire submission date to identify and report associated information such as movement expenses, payment dates and FOP data. CCT maintains that, in this case, the initial cut-off date for reporting the post-POI shipments reasonably chosen by CCT was the end of May 2006 and CCT could not reasonably have identified these additional suppliers until September

2006, when the shipment data were voluntarily updated by CCT. Moreover, CCT argues that when it voluntarily reported these suppliers to the Department it indicated that if the Department instructed CCT to report the FOP data from these suppliers it would do so. CCT argues that it heard nothing further from the Department with respect to CCT's express offer to report the data if requested and, therefore, CCT maintains that it understood that the Department had excused CCT from reporting this FOP data on the same basis that the Department had previously excused CCT from reporting FOP data for other suppliers. CCT contends that it acted to the best of its ability in identifying this information and should be excused from reporting this data.

NORIT, one of the Petitioners in this case, argues that CCT's suppliers should be considered respondents and interested parties as FOP data are so important to an antidumping analysis in an NME proceeding, and the producer is just as integral to the process as the exporter, and both should be properly considered "respondents" in the context of the proceeding.

NORIT contends that it is the Department's longstanding practice is to consider the term "interested parties" to encompass upstream suppliers and the Department has explicitly characterized uncooperative suppliers as "interested parties." *See, e.g, Certain Tissue Paper Products and Certain Crepe Paper Products From the People's Republic of China: Notice of Preliminary Determinations of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Products*, 69 FR 56407 (September 21, 2004).

NORIT maintains that applying AFA to non-responding producers is critical to the Department's application of combination rates in NME cases and that the Department's combination rate policy permits producers that export through a responding exporter to get the combination antidumping duty rate of all suppliers that exported through the investigated exporter. NORIT argues that both the producer and the exporter are interested parties in establishing the combination rate that applies to them both, as well as to other producers exporting through that exporter.

NORIT contends that the Department has the discretion and ability to administer the antidumping law in a manner that prevents evasion of antidumping orders. *See Tung Mung Development v United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002), *aff'd*, 354 F.3d 1371 (Fed. Cir. 2004). NORIT argues that applying anything other than AFA in this instance will encourage an evasion of the antidumping laws and benefit those producers that did not respond through CCT, as well as CCT itself. Further, NORIT argues that the "Glossary of Terms" of the Department's antidumping questionnaire, in discussing "Facts Available," makes clear that facts available are applied even where "other" parties are at fault. *See* Antidumping Questionnaire at Glossary of Terms.

NORIT asserts that it would be bad precedent for the Department to accept a *prima facie* showing of due diligence by an exporter as grounds for waiving AFA and, instead, considering uncooperative parties' refusals to warrant no more than “neutral” facts available. NORIT argues that a dishonest exporter and producer could create a convincing "record" of requests for cooperation and refusals, culminating in certain suppliers not providing FOP data, secure in the knowledge that there will be no adverse consequences which would seriously undermine the Department's combination rate methodology.

NORIT notes that the Department's remedy for the missing information on the record was simply to apply the highest calculated normal value from among the responding suppliers. Petitioner contends that this was not, therefore, the application of a punitive rate to CCT, but instead, the substitution of cooperative producers' data for missing data from uncooperative producers was used to balance the need for an accurate result with the need to ensure that no manipulation of the record would occur.

NORIT contends that if the Department decides for the final determination to agree with CCT's case brief arguments and use less adverse FA for the uncooperative suppliers, it should exclude the uncooperative suppliers from the benefit of the company-specific CCT rate and instead specify that any exports of AC produced by the uncooperative suppliers, via CCT or any other exporter, including "Section A" exporters, will be subject to the "China-wide" deposit rate. NORIT argues that if the Department accepts CCT's logic that CCT should not be penalized for its suppliers' uncooperativeness, it should nevertheless ensure that the suppliers themselves do not reap the benefit of a lower company-specific rate despite their refusal to cooperate.

Department's Position:

We agree with Petitioner NORIT that it is appropriate to continue to apply partial adverse facts available, as we did in the *Preliminary Determination*, to the CCT suppliers that did not report FOP information.

With regard to the suppliers SXZ, DCA, YAC, DSZ, TX, LQY, DRA, or DKA, for which CCT provided no FOP information the Department finds that the application of adverse facts available is warranted because CCT did not act to the best of its ability. Also, with regard to XX, although it did provide a FOP database, the Department is applying adverse facts available to the sales of XX's merchandise by CCT because XX purchased the activated carbon from upstream producers and that FOP information was not reported.

CCT is owned 100 percent by a Petitioner in this investigation; given this unusual circumstance, it strains credulity to conclude that a wholly owned subsidiary of Petitioner would not have fully researched its suppliers in order to report them all at the outset of the investigation. If it were truly not possible to identify all suppliers before the questionnaire response was due, a fully cooperative respondent would have, upon discovering a new supplier, immediately alerted the Department and given a realistic date as to when it would be able to provide the FOP data for this newly discovered supplier. When CCT informed the Department of its additional suppliers, some just prior to the *Preliminary Determination*, it gave no mention of when it could provide this data and instead told the Department that it would provide the information if the Department wanted it.

As late as September 29, 2006, less than a week before the signature date of the *Preliminary Determination*, CCT was still identifying additional suppliers to the Department. The Department's original questionnaire asked CCT to report the factors of production for the ultimate producer of the merchandise under consideration. The original questionnaire states, "If your company did not produce the merchandise under consideration, we request that this section

be immediately forwarded to the company that produces the merchandise and supplies it to you or to your customers." *See* May 4, 2006 Questionnaire to CCT at page D-2. Further, on August 21, 2006, the Department sent CCT a letter which stated, in part, "{w}e are also requiring CCT to report the FOP information for the ultimate producer of the merchandise under consideration." *See* August 21, 2006, letter to CCT.

As CCT was already instructed twice to provide the FOP data for all of its suppliers, for it to argue in its case brief that the Department never asked CCT to report this information and to state that CCT was not given an opportunity to submit this information is disingenuous. After CCT was instructed twice to report the FOP data for its ultimate suppliers it continued to inform the Department of newly discovered suppliers and told the Department it would be "pleased to seek" the information "if so instructed by the Department." *See, e.g*, CCT's letter to the Department dated September 12, 2006, September 20, 2006, September 27, 2006, and September 29, 2006. CCT was obligated to provide the FOP data for these suppliers and it failed do so. Therefore, CCT did not act to the best of its ability.

With regard to suppliers HD and NC, the Department denied CCT's exclusion request and informed CCT that the FOP data for HD and NC were due on July 31, 2006, which was then extended to August 7, 2006. CCT informed the Department that it was unable to provide this information and cited its attempts to obtain the FOP information from these suppliers. In the *Preliminary Determination*, we determined that HD and NC were uncooperative. *See* Memorandum to James C. Doyle from Catherine Bertrand, Application of Partial Adverse Facts Available for Calgon Carbon (Tianjin) Co., Ltd., in the Preliminary Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China, dated October 4, 2006.

CCT argues that the respondent in this investigation is CCT and not the unaffiliated suppliers, and therefore the standard of cooperation should be based on CCT's actions and not those of the unaffiliated suppliers. However, Section 771(28) of the Act states that the term "exporter or producer"

> means the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate. For purposes of section 773 the term "exporter or producer" includes both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise.

Therefore, by definition, the exporter includes the producer of the subject merchandise, and, where the producer is separate from the exporter, the exporter is responsible for obtaining the cooperation of its suppliers. Further, the Department has previously characterized uncooperative suppliers as interested parties. *See, e.g, Certain Tissue Paper Products and Certain Crepe Paper Products From the People's Republic of China: Notice of Preliminary Determinations of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Product*, 69 FR 56407 (September 21, 2004), unchanged in *Notice of Final Determination of Sales at Less Than Fair*

Value: Certain Tissue Paper Products from the People's Republic of China, 70 FR 7475 (February 14, 2005). CCT has failed to obtain this cooperation from its suppliers, and has not shown that the suppliers were unable to provide this information. Rather, the record evidence shows that the suppliers were uncooperative. As the wholly-owned subsidiary of one of the two U.S. domestic companies that filed this investigation, CCT knew, or should have known, the requirements for participation as a mandatory respondent and should have arranged with all of its suppliers to provide the necessary FOP information. Moreover, the Department finds that CCT has not presented any information since the *Preliminary Determination* which would cause the Department to change its determination.

If an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may apply adverse inferences where the use of facts available is appropriate. *See* section 776(b) of the Act. Pursuant to 776(b) of the Act, the Department may use information that is adverse to the interest of that party when the party fails to cooperate by not acting to the best of its ability in responding to the Department's request for information. *See Nippon Steel* 337 F.3d at 1381-1382. We have determined that CCT's suppliers for which no FOP data were submitted did not act to the best of their ability, and further, CCT did not act to the best of its ability to obtain this information. Thus, an adverse inference is warranted. This position is consistent with that taken by the Department in *Cased Pencils Issues and Decision Memo* at Comment 10, which cited *Ferrovanadium and Nitrided Vanadium* 62 FR at 65658. In *Ferrovanadium and Nitrided Vanadium*, the Department stated that "by failing to respond Chusovoy {the producer} is an interested party which has not cooperated to the best of its ability under section 776 (b) of the Act. Therefore, we have continued to use an adverse inference in selecting from the facts available to determine the margins for Galt's sales of Chusovoy-produced merchandise ...." In the instant investigation, as partial AFA, we have assigned the weighted average of the two highest CONNUM-specific calculated normal values from any supplier of CCT and Jacobi to the sales of merchandise produced by HD, NC, SXZ, XX, DCA, YAC, DSZ, TX, LQY, DRA, and DKA.

Comment 21: PXZ's Pressroom Product

NORIT argues that, at verification, XZ revealed for the first time that it had consumed a certain amount of purchased pressroom product. *See* XZ Report at 1. NORIT argues that this amount should be imputed to all factors of production reported by CCT.

NORIT argues that because the Department verified only a small sample of CCT's suppliers, it should impute XZ's significant reporting error to the unverified suppliers. NORIT maintains that an amount of pressroom product should be added to the factors of production for each unverified CCT supplier as an adverse inference.

CCT argues that XZ did not fail to report a certain quantity of pressroom product, but that this consumed quantity was duly reported, together with self-produced pressroom product, in XZ's FOP responses and all factor calculations and yields properly reflect this amount. CCT maintains that the Department's verification report for XZ notes no discrepancies in reconciling these totals, and XZ's only mistake was in failing to distinguish within the total reported input quantity that part of it should have been labeled as purchased rather than self-produced. See XZ

Report at 12-13. CCT argues that there is no factor of pressroom product that was "not reported" by XZ and even if there were it there would still be no legal basis to simply "impute" this amount to every other unverified supplier. CCT contends that there is no basis to take the unprecedented action of arbitrarily "imputing" XZ's unique and isolated classification error to all of the other Chinese suppliers who were not verified as there is no evidence that this was not limited to XZ.

Department's Position:

The Department agrees with CCT that it is improper to impute the findings of the XZ verification to CCT's other suppliers. There is no evidence on the record to suggest that the results of the verification of XZ would apply to other suppliers of CCT. Additionally, we note that CCT's other suppliers provided unique Section D responses and FOP databases to the Department, with distinct product codes and production processes. Further, although the Department was unable to verify all the suppliers of CCT, the verification of XZ was not intended to be imputed to other suppliers. Therefore, we find that it is not appropriate to impute the findings from XZ's verification to the other CCT suppliers.

Moreover, we agree with CCT that XZ did not fail to report the total quantity of pressroom product, but the error related to the amount of purchased versus the amount that was self-produced of this input. We note that the Department accepted this change as a minor correction at verification and required CCT to submit a new database incorporating this correction. Accordingly, no further adjustment to CCT's FOP data for this issue is necessary.

Comment 22: Whether to Impute the Verification Findings of NXGH to CCT

CCT argues that problems in Jacobi's verification of FOP data for NXGH are not relevant to, and should not impact, CCT. CCT contends that the Department chose to verify only Jacobi's questionnaire responses for NXGH material. CCT maintains that the Department cannot use the verification results with respect to CCT because the FOP data reported by CCT for NXGH is not the same as that reported by Jacobi, Jacobi and CCT are not affiliated and separately developed and reported FOP data for the specific products they purchased respectively from NXGH, and it would be unfair for the Department to penalize CCT for Jacobi's inadequate preparation and failure to verify its own data, particularly where CCT successfully verified the FOP data it submitted for its Chinese suppliers.

CCT argues that it made its own methodological choices and developed its own reporting and allocation worksheets independent of any similar efforts that may have been undertaken by Jacobi or by NXGH on behalf of Jacobi. CCT contends that the NXGH FOP data the Department set out to verify for Jacobi are, in every relevant sense, distinct and separate from the FOP data reported by CCT.

CCT maintains that it had no conceivable involvement in, or influence over, Jacobi's preparations for, and conduct of, the verification in China for which Jacobi alone is responsible. CCT notes that the Department completed verification of the FOP data it submitted for its other Chinese suppliers, and CCT remains prepared to likewise verify the FOP data it reported to the

Department for NXGH. CCT maintains that there is no evidence on the record of this investigation to suggest that CCT failed in any way with respect to the data it prepared and reported for NXGH's factors of production.

NORIT argues that NXGH failed verification in every way and that its data are unusable. NORIT asserts that the Department noted that NXGH was unable to document differences in production quantity between its own production records and its accounting records. See NXGH Report at 1, 10 & 17. NORIT contends that the Department further noted that NXGH officials were unable to produce any attendance records to support recorded labor data and the Department verifiers also were unable to verify raw material or energy inputs. *Id*. at 1, 15, and 20-22.

NORIT maintains that the Department noted major discrepancies between production records and finished product inventory entries for both NXGH's Helan and Yinchuan factories. NORIT contends that CCT must also not be permitted to benefit from NXGH demonstrated inaccurate responses. NORIT asserts that there is no reason to believe that the outcome of NXGH's verification would have been different for its data reported by CCT. NORIT argues that the majority of the errors at the verification had nothing to do with a failure of Jacobi and NXGH to prepare for verification, but were a result of NXGH's admitted actions to knowingly doctor its accounting records as to labor, overall cost of production, and profit when it suited its purpose to do so.

NORIT states that there are no circumstances under which data provided to CCT by NXGH can be considered accurate or verifiable for purposes of the final determination and all data by NXGH should be rejected for the final determination. Therefore, NORIT argues that in the final determination the Department should apply AFA with regard to data provided by NXGH as a supplier to CCT.

Department's Position:

While the Department agrees with Petitioners that significant errors were found with respect to NXGH at the verification of Jacobi's responses, as described in detail at Comment 7, the Department disagrees that it is appropriate to impute these findings to CCT.

As an initial matter, we note that over the course of the verification of Jacobi's response with respect to NXGH, the Department found two distinct types of errors. Firstly, the Department found that NXGH's books and records contained internal inconsistencies and errors with respect to reconciliations between production and accounting records and booking of labor. *See* NXGH Report at 2 and 15. Secondly, the Department also was unable to complete the verification of a majority of Jacobi's reported FOPs for NXGH. However, while Petitioners suggest that these failures were inherent to NXGH's books and records, making them unreliable for purposes of calculating a margin for any respondent in this investigation, the Department disagrees as both of these failures were as a result of Jacobi's failure to cooperate to the best of its ability and Jacobi's failure to prepare for verification. In effect, Jacobi's failure to cooperate prevented the Department from definitively establishing whether NXGH's books and records were substantially internally inconsistent. While Jacobi's failure necessitates the application of AFA

to its reported NXGH data, the Department has no evidence on the record to definitively establish that NXGH's books and records are inherently flawed as would undermine their overall utility in calculating a margin for CCT. Specifically, there is no substantial record evidence to establish that NXGH's data *per se* is inherently and definitively flawed such that reliance on it for calculating a margin for CCT is inappropriate. Moreover, we note that CCT and Jacobi have reported distinctly different products, constructed different reporting methodologies, and reported different chemical material inputs sourced from NXGH.

Finally, and perhaps most importantly, CCT did not have an opportunity to participate in the verification of NXGH, raising due process issues. When the Department issued the verification outline of this supplier, it was sent to counsel to Jacobi and the Department indicated that NXGH was being verified as a supplier for Jacobi, which would consist of verifying the FOPs for merchandise sold to Jacobi. CCT's counsel was not responsible for preparing this company for verification nor was CCT's counsel present at this verification and, therefore, an adverse inference is inappropriate in this case. There is no evidence on the record to conclude a lack of cooperation by CCT with respect to NXGH and no evidence that the data submitted by CCT with respect to NXGH are unusable.

Therefore, because there is no evidence on the record that the flaws found at NXGH with respect to the data reported by Jacobi necessarily apply to CCT, because there are significant differences between CCT and Jacobi's responses to the Department with respect to NXGH, and because CCT was not given the opportunity to participate in a verification of their data from NXGH, the Department finds that the application of AFA to CCT with respect to its supplier NXGH is inappropriate.

Comment 23: Production Denominator

CCT argues that if the Department disagrees that its claimed by-products do not qualify as byproducts, then the Department must recognize the quantity of these materials as finished product over which the relevant input usages must be allocated. CCT notes in this regard that it submitted alternative FOP calculations after the Preliminary Determination that report the quantities of these materials generated and treat the byproduct material as finished product for purposes of the cost allocations for CCT and these calculations were examined at CCT's verification and confirmed to be accurately reported and complete. See CCT Report at 24-26 and Ex. 9. CCT maintains that if the Department continues to view these materials as "subject merchandise," then the Department must use the alternative FOP calculations that treat these materials as finished goods.

Petitioners argue with respect to CCT that even if a by-product is recognized by the Department, the FOP consumption per-unit of finished product should be based on total consumption of individual factors. Petitioners argue that the FOP numerator cannot be limited to the FOPs consumed in the production of the finished product net of what CCT claims as by-product. Petitioners assert that the per-unit consumption should be total consumption divided by total finished product, with no by-product offset.

Petitioners note that CCT submitted an alternative FOP database which includes activated carbon fines in the production denominator. *See* CCT Report at 14-15, citing CCT's October 18, 2006, supplemental questionnaire. Petitioners argue that the Department should ensure that quantities of activated carbon fines to which production-related direct input consumption are allocated are not also used as an offset to costs (*i.e.*, they must not also be treated as by-products), as such treatment would be an improper double reduction to normal value.

Department's Position: As the Department determined in Comment 5 to not allow a by-product credit for CCT's claimed by-products, with the exception of pressroom product, the Department agrees with CCT that it is appropriate to include the quantity of these materials as finished product over which the relevant input usages must be allocated because the Department is considering this material to be subject to the scope of this investigation. *See* Comment 5, above.

The Court has previously instructed the Department to adjust the factors of production when it denies an byproduct offset because the merchandise is subject to the scope of the investigation. In *Anshan Iron & Steel Co., Ltd. v. United States*, the Court ordered the Department to adjust respondent's factors of production calculations by including defective sheet as merchandise under investigation when the Department deemed this was not a byproduct and determined it was actually merchandise under investigation. *See Anshan I*, Slip Op. 2003-83.

The Department notes that CCT submitted alternative FOP calculations that report the quantities of the denied byproduct material as finished product and which the Department verified. Therefore, for the claimed by-products for which we have denied an offset we will used CCT's alternative FOP calculations such that the denied byproducts are included in the finished product denominator consistent with the Department's practice.

Comment 24: Calculation of Indirect Selling Expense

NORIT asserts that the Department determined at verification that certain non-U.S. sales were incorrectly included in the indirect selling expense ("INDIRSU") denominator. *See* Memorandum to the File: Verification of the Sales Response of Calgon Carbon Tianjin Co., Ltd. and Calgon Carbon Corporation in the Antidumping Duty Investigation on Certain Activated Carbon from the People's Republic of China, dated January 5, 2007 ("CCC Report") at 3 and 28. NORIT contends that the INDIRSU ratio should be revised to be based on a denominator that excludes the value of these improperly included sales.

NORIT contends that CCT's listing of expenses included in, and excluded from, the INDIRSU numerator resulted in an understatement of indirect selling expenses. *See, e.g.*, CCT's August 30, 2006, supplemental response at C-45 and Attachment C-40. NORIT maintains that it requested that other income statement items, representing an additional 11.94 percent of the total sales value for 2005, be demonstrated to have been included elsewhere in CCT's reporting of costs associated with its economic activity in the United States. NORIT argues that CCT should have explained during verification how these expenses were reported in CCT's reported costs and expenses. NORIT asserts that CCT attempted to exclude many of these expenses as not "related to subject operations." *See* CCC Report at 27.

NORIT argues that instead of accepting the reallocated U.S.-activity expenses in a manner that understates the INDIRSU ratio, the Department should simply use a single numerator of all U.S. expenses over a single denominator of all U.S. sales. NORIT maintains that with regard to specific cost centers, CCT did not explain why the certain expense items were excluded from the INDIRSU numerator. NORIT argues that these categories of excluded items relate to CCT's economic activity in the United States and thus must be allocated to subject merchandise. NORIT alleges that CCT provided no basis for excluding certain significant expenses. NORIT argues that the Department should allocate such expenses in their entirety over all sales, to ensure all appropriate expenses are captured. Therefore, NORIT argues that the Department should revise the denominator used to calculate the indirect selling expense ratio, based on verification findings that it was overstated, and revise the numerator to reflect a neutral allocation of certain additional income statement items, with CCT's exclusions of such expenses as not "related to subject operations" being rejected.

CCT disagres with NORIT's claim that the denominator used to calculate the INDIRSU ratio should be revised to reflect a verification correction for certain non-U.S. sales. CCT argues that the verification report states that the revised calculation reported to the Department in its first-day corrections already reflects this correction and so no further change to the verified denominator is required. *See* CCC Report at 28.

CCT argues that NORIT's assertion that all expenses related to any "economic activity in the United States" must be included in indirect selling expenses is erroneous as it is entirely unsupported by legal references or case precedent and is false. CCT maintains that the Department recently confronted a similar claim made by the petitioner in a case where the Department rejected the claim that U.S. further-manufacturing expenses should be included in indirect selling expenses. *See Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 FR 29310 (May 22, 2006). CCT argues that section 772(d)(2) of the Act holds that any further manufacturing costs to be deducted actually be incurred with respect to the particular transaction providing the basis for the CEP starting price. CCT contends that there is no basis under the statute to deduct from the CEP starting price further manufacturing costs incurred with respect to transactions that are not part of this investigation.

CCT also cites to a case where the Department refused to add certain administrative expenses to U.S. indirect selling expenses on the grounds that these amounts were more appropriately "characteristic of G&A expenses" and therefore classified as part of the "U.S. COM" rather than U.S. indirect selling expenses. *See Final Determinations of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux From France*, 59 FR 14136 (March 25, 1994). CCT argues that where the respondent engages both in selling activities and substantial manufacturing activities it is the Department's established practice to segregate costs between selling and manufacturing in order to avoid double-counting of the manufacturing-related expenses by excluding them from the U.S. indirect selling expense ratio.

CCT asserts that the Department verified at CCC that in the normal course of business CCC records depreciation expenses by cost center. CCT argues that for reporting purposes CCC

included the full amount of depreciation for each of the cost centers appropriately identified as sales-related and all of the depreciation expenses included in the value on the income statement that are associated with U.S. sales of carbon products have been reported as part of INDIRSU; CCT contends that no additional amounts can or should be added.

CCT also maintains that amortization expenses are correctly reported and that CCC identified the amortization expenses that are sales-related by first identifying amortization related to the "Americas Carbon/Service" business segment and allocating this amount to the Americas Carbon/Service cost centers. CCT asserts that these amounts were reconciled to the Depreciation and Amortization line shown on the audited income statement, thereby demonstrating that these expenses are fully accounted for.

CCT argues that CCC excluded research and development expenses from INDIRSU because, in accordance with well-established Department practice, research and development expenses are period costs that are properly classified as part of manufacturing, not selling, expenses. *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.: Notice of Final Results of Antidumping Duty Administrative Reviews*, 57 FR 28360 (June 24, 1992). CCT contends that had CCC reported U.S. further-manufacturing expenses ("FURMAN"), the FURMAN would have included these R&D expenses. CCT argues that CCC acted properly in excluding these amounts from INDIRSU.

CCT maintains that CCC properly excluded expenses related to the Gulf Coast facility from the reported INDIRSU ratio because this facility is used to produce non-subject merchandise by re-activating depleted activated carbon. CCT argues that these expenses are excluded both because they relate solely to non-subject merchandise (reactivated carbon) and because they are classified as manufacturing, not sales-related.

CCT asserts that CCC also properly excluded interest expenses to avoid double-counting of imputed credit expenses. CCT argues that the Department has confirmed in past cases that while interest expenses incurred by a U.S. affiliate are potentially deductible as part of indirect selling expenses, the Department's practice is to add U.S. interest expenses to indirect selling expenses "only after deducting U.S. imputed credit expenses and U.S. inventory carrying costs, so as to eliminate the possibility of double-counting U.S. interest expenses." *See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of Antidumping Duty*, 71 FR 53370 (September 11, 2006). CCT argues that CCC demonstrated the relevant calculation at verification and demonstrated that the interest expenses are more than fully-absorbed by imputed credit and inventory carrying costs.

CCT argues that regarding the income statement items identified by Petitioner is "other expenses," the Department's verification report demonstrates that CCC reported the correct amount of such expenses allocable to subject merchandise. CCT asserts that CCC first deducted taxes and foreign exchange gains and losses and then calculated the amount of such expenses relating to the six-month period of review and then allocated that amount to the sales-related cost centers in the same manner as was done for amortization. *See* CCC Report at 28 and Exhibit 7, at 19-23. CCT maintains that the Department noted no discrepancies with these calculations and that these amounts also were properly and fully reported.

CCT argues that with regard to CCC's exclusion from the INDIRSU ratio the costs associated with four cost centers, these expenses are all properly excluded from the INDIRSU ratio because they are not selling related. CCT contends that others were properly excluded from the INDIRSU because they are general and administrative expenses in nature and normally would be reported as part of U.S. further-manufacturing expenses. CCT asserts that if the Department concludes that the last two cost centers are, in addition to being manufacturing-related, also indirectly supportive of selling activities relating to subject merchandise, then the Department must properly allocate these expenses to both manufacturing and selling.

Department's Position:

We agree with CCT that the denominator used to calculate the INDIRSU ratio had been revised at verification as a correction and no further change to the verified denominator is required. *See* CCC Report at 28. However, as this change has not yet been incorporated into the databases submitted by CCT, the Department will make this correction in its margin calculation programming so that the verified denominator figure is used by applying the new INDIRSU ratio which results from this change.

With regard to the numerator, we also agree with CCT that its treatment of depreciation and amortization, research and development expenses, Gulf Coast Facility impairment charge, interest expense, other expenses, and, the exclusions of certain cost centers was appropriate. We find that the excluded expenses are related to manufacturing and find that they would be captured in the selling, general, and administrative expenses ("SG&A") of the surrogate financial ratios. At verification, we conducted a thorough review of CCC's cost centers and found that they maintain very specific and detailed costs centers in the ordinary course of business, which allows them to separate selling expenses from manufacturing expenses. *See* CCC Report at 27-28 and verification exhibit 7. In our review of CCT's allocations of CCC's expenses, we found no evidence that CCT improperly excluded certain selling related expenses from the calculation of the INDIRSU ratio.

The depreciation, amortization, and research and development expenses cited by NORIT all relate to CCC's further manufacturing operations. Therefore, it is appropriate not to account for these expenses in the INDISRU calculation. Regarding the interest expense, we agree with the principle elucidated by CCT and find no indication on the record of at verification that CCT did not properly apply this principle. For the other expenses which CCT excluded, we find no indication that these expenses relate to selling activities and agree with CCT that the expenses should be excluded from the INDIRSU calculation.

As noted by CCT, it is appropriate to segregate costs between selling and manufacturing and to avoid double-counting of the manufacturing-related expenses by excluding them from the U.S. indirect selling expense ratio. *See, e.g, Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part*, 69 FR 55574 (September 15, 2004). Therefore, we will use the new

INDIRSU ratio which resulted from the verification changes in the margin program. *See* CCC Report at 27-28 and verification exhibit 7.

Comment 25: U.S. Warehousing Expense

CCT argues that the cost for its Fayard warehouse was properly reported. CCT asserts that where expenses are extraordinary and unforeseen, it is the Department's practice to exclude these expenses because sales prices in the period could not possibly have reflected the anticipation of such expenses and their inclusion in the Department's price deductions would therefore distort the margin calculation. *See Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 69 FR 6259 (February 10, 2004) and accompanying Issues and Decision Memorandum at Comment 6. CCT states that CCC reported the average warehousing cost incurred at other warehouses as a surrogate for the unforeseen Fayard warehouse costs. CCT argues that the damage to the Fayard warehouse was caused by Hurricane Katrina, which was not a regular seasonal occurrence.

CCT explains that CCC incurred significant, extraordinary and unforeseeable expenses at the Fayard warehouse as a result of this damage, including costs related to testing all of the product that had been stored therein to assess the level of damage as well as the costs of moving the product to another facility. CCT argues that CCC did not anticipate, and could not have reasonably anticipated, incurring this type of damage to its facilities and the associated expenses and that, in this respect, the extraordinary expenses at issue are analogous to the extraordinary bad debt expenses related to unforeseeable bankruptcies that have similarly been excluded by the Department in other proceedings. CCT maintains that the Department has recognized that it is inappropriate to deduct a company's unforeseeable expenses from its reported price, because the amounts could not reasonably have been expected to be reflected in the company's pricing. *See Id.*

Petitioner NORIT argues that the Department should take into account all POI expenses incurred with respect to the Fayard warehouse as warehousing expenses for purposes of the Department's margin calculation. Petitioner argues that hurricane damage is a regular, seasonal occurrence in much of the Gulf Coast and Atlantic seaboard regions of the United States. Petitioner maintains that while such damage does not occur in every location every year, it is nevertheless far from "entirely unforeseeable" as CCT attempts to argue. Petitioner asserts that the actual expenses incurred must be taken into account as warehousing expenses for margin calculation purposes.

Department's Position:

The Department's long-standing practice with regard to unforeseen events is to treat expense items as extraordinary only when they are both unusual in nature and infrequent in occurrence. *See Notice of Final Determination of Sales at Less than Fair Value: Static Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8933 (February 23, 1998) (where the Department rejected respondent's claim for an offset due to losses incurred because of a fire); *Final Determination of Sales at Less than Fair Value: Oil Country Tubular Goods From Argentina*, 60 FR 33539, 33549 (June 28, 1995) (where the Department rejected respondent's claim for an offset due to restructuring costs); and *Final Determination of Sales at Less Than Fair Value:*

Fresh Cut Roses from Ecuador 60 FR 7019, 7038 February 6, 1995 (where the Department allowed an offset for damage due to hurricane-force winds).

Because adjustments of this type are by definition extraordinary, the Department has made its decisions regarding these adjustments on a case-by-case basis. Hurricane Katrina was a very destructive storm in terms of economic losses to the United States. Therefore, the Department finds that the damage resulting from Hurricane Katrina was unforeseen, unusual in nature and infrequent in occurrence. As no storm in the nation's history has ever caused this amount of economic damage, it cannot be reasonably said that this type of damage was foreseen.

Moreover, in our review of the case-specific facts, we find that CCT provided substantial evidence regarding its claim. CCT explained in its questionnaire response that half the roof of the warehouse at issue was torn off and the other half was significantly damaged and fell in on the warehoused product, which then had to be moved to another location. *See* CCT's August 24, 2006, response at page 20.

As we find the damage to CCT's Fayard warehouse was a result of an unforeseen, unusual, and infrequent occurrence, we determine that it is appropriate to use the average warehousing cost incurred at other warehouses as a surrogate for the Fayard warehouse costs. Accordingly, we are making no changes to the *Preliminary Determination* with respect to CCT's Fayard warehousing expenses.

Comment 26: Marine Insurance

NORIT argues that the Department noted in its verification report that CCC failed to include additional marine insurance charges. *See* CCC Report at 2, 22-23. Petitioner argues that the Department should revise reported marine insurance to reflect the corrected marine insurance.

CCT did not respond to this comment.

Department's Position:

The Department agrees with Petitioners that the marine insurance figure should be revised. At the verification of CCC we examined the marine insurance policy documents. We noted that a war risk premium was on the policy, and CCC explained that they did not include this war risk premium in its calculation of marine insurance. *See* CCC's Report at 2, 22-23. Therefore, for the final determination, we are revising the reported marine insurance figures to include the war risk premium. *See* CCT's Final Analysis Memo.

Jilin Bright Future:

Comment 27: Whether to Apply Adverse Facts Available to Jilin Bright Future

Petitioners argue that the Department should apply total AFA to Jilin Bright Future because Jilin Bright Future's questionnaire responses, particularly its factors of production data, could not be verified and are unreliable as a basis for the final determination. Petitioners note that prior to the

Preliminary Determination, they urged the Department to apply total AFA to Jilin Bright Future for several reasons but that the Department determined to accept Jilin Bright Future's data. *See Preliminary Determination*, 71 FR at 59729-30. Petitioners maintain that verification established that critical aspects of the information of Zuyuon Bright Future Activated Carbon Plant ("ZBF"), Jilin Bright Future's affiliate supplier, could not be verified and that verification demonstrated that ZBF does and did maintain its books and records in a manner that would have permitted it to provide actual FOP data rather than the standards-based allocations it did provide. *See* Verification Report of Jilin Bright Future Industry and Commerce Company, Ltd. And Jilin Bright Chemicals Co., Ltd. in the Antidumping Investigation of Certain Activated Carbon from the People's Republic of China (December 8, 2006) ("ZBF Verification Report"). Petitioners allege that Jilin Bright Future deliberately misled the Department regarding the records it keeps.

In arguing that total AFA should be applied, Petitioners cite to several findings from the verification of Jilin Bright Future and ZBF. First, Petitioners explain that the verification of ZBF demonstrated that direct material coal consumption, which Petitioners identify as ZBF's most critical input for the production of activated carbon, was based on self-selected samples even though ZBF maintained actual production records in the normal course of business. Petitioners explain that, in its responses, Jilin Bright Future claimed that actual production records were not maintained and that estimates and allocations were necessary. *See* Jilin Bright Future's August 25, 2006, supplemental questionnaire response at 21. Petitioners claim that, in the *Preliminary Determination*, the Department accepted Jilin Bright Future's explanations on good faith, but that the ZBF verification report demonstrates Jilin Bright Future/ZBF had the ability to respond with accurate, actual production data for direct material coal consumption but did not do so. *See* ZBF Verification Report at 7. Petitioners maintain that the Jilin Bright Future's decision to report consumption based on a sample day represents selective cherry-picking, which Petitioners portray as a decision by Jilin Bright Future to understate actual total consumption amounts during the period. Moreover, Petitioners contend that the reasons proffered by Jilin Bright Future for taking this approach are without merit and do not justify its actions. Petitioners maintain that the Department's determination at verification to refuse to accept worksheets based on the never-before-submitted (or even acknowledged) actual production records decision was correct and in accordance with the Department's policy to reject new factual information at verification. *See* Jilin Bright Future Verification Outline at 2 (October 27, 2006) and *Shandong Huarong General Group Corp. v. United States*, Slip Op. 03-135 at 12 (CIT Oct. 22, 2003) ("*Shandong Huarong*"). Petitioners argue that because ZBF not only failed to place the actual production data on the record, but misled the Department about its ability to do so, Jilin Bright Future's FOP response is inaccurate and unusable for the final determination.

Petitioners also claim that at verification the Department found that ZBF failed to previously report a second activation furnace. Petitioners state that although production of subject material in this second furnace allegedly occurred prior to the POI, ZBF's failure to identify this furnace prevented Petitioners and the Department from considering whether data for products produced on a different furnace prior to the POI should be valued differently than the first activation furnace given the furnaces' different efficiencies. Petitioners argue that an additional deficiency from the ZBF verification was respondent's inability to substantiate the claimed allocation factor between granular activated carbon and powdered activated carbon when asked to do so by the Department. *See* ZBF Verification Report at pages 8-9. Finally, Petitioners cite the

Department's finding that ZBF maintained actual "boiler records" for the production furnace in use during the POI despite Jilin Bright Future's statements in its questionnaire responses that ZBF could not differentiate between consumption of energy and feedstock coal. *See* ZBF Verification Report at page 9. Based on the aforementioned findings at the ZBF verification, petitioners argue that no element of Jilin Bright Future/ZBF's coal consumption figures can be accepted as complete and accurate. Petitioners conclude that given the percentage of subject merchandise sold by Jilin Bright Future that was supplied by ZBF either directly or through Tonghua Bright Future Activated Carbon Plant ("TBF"), the inability to rely on the ZBF data calls in to question the veracity of Jilin Bright Future's entire response.

In addition to problems with the ZBF verification, Petitioners claim that information collected at the sales verification suggests that there was a potential error in reporting the proper U.S. customer. *See* Petitioners' Jilin Bright Future Case Brief at page 11.

In making their case for the application of total AFA, Petitioners first review the standard for applying facts available. Petitioners argue that application of facts available to Jilin Bright Future is warranted based on 19 U.S.C. 1677e(a)(2)(A), (C) & (D) of the Act because ZBF misrepresented its ability to provide complete and accurate information and withheld information requested by the Department thereby significantly impeding the proceeding and preventing verification of the information provided. Noting that Jilin Bright Future was provided several opportunities to correct its representations and reported data, Petitioners argue that the Department has no further obligation under section 1677m(d) to provide Jilin Bright Future with an opportunity to further correct its data at verification. *See Shandong Huarong* at 12.

Citing *Nippon Steel*, 337 F. 3d at 1383, Petitioners argue that the application of AFA under 19 U.S.C. 1677e(b) is appropriate because Jilin Bright Future failed to "put forth its maximum efforts to investigate and obtain the requested information from its records." Moreover, Petitioners assert that the Court of International Trade has found that purposefully withholding or providing misleading information is grounds for application of AFA under 1677e(b). *See Shanghai Taoen* 360 F.Supp 2d 1339 at 1345. Petitioners claim that none of the provisions of 19 U.S.C. 1677m(e) apply because: 1) none of the information was provided in the time set by the questionnaires; 2) major portions of the response were not verified as accurate; 3) there is not enough information for the Department to reconstruct a usable FOP response; 4) Jilin Bright Future did not act to the best of its ability; and 5) the responses could not be reconstructed because the necessary information is not on the record. Petitioners claim that it is the Department's practice to apply total AFA in cases where there is not a reliable basis for calculating normal value. *See Final Determination of Sales at Less Than Fair Value: Prestressed Concrete Wired Strand from Mexico*, 68 FR 68350 (December 8, 2003) (the Department applied total AFA where a cost response could not be verified). Petitioners also cite *Borden v. United States*, 4 F. Supp. 2d 1221, 1245-46 (CIT 1998) to support the argument that section 1677m(e) is not applicable when a respondent has failed to act to the best of its ability.

Petitioners argue that the application of partial AFA is not appropriate given the wide-ranging errors in Jilin Bright Future's FOP responses and because the application of partial AFA (*e.g.*, the application of the highest reported factor) would not provide an appropriate incentive for more accurate and complete reporting. Moreover, Petitioners claim that in recent NME

determinations the Department has also applied total AFA when the Department finds that there was purposeful withholding of information and when the information affects a significant portion of the reported sales, as it does in the case of Jilin Bright Future. *See Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the Peoples' Republic of China*, 71 FR 16,116 (March 30, 2006), and accompanying Issues and Decision Memorandum ("Artist Canvas Issues and Decision Memo"), at Comment 11.

Although Petitioners urge the Department to apply total AFA, they argue that if the Department does not agree, it should apply partial AFA. Depending on what information the Department determines is usable, Petitioners suggest various methods of applying partial AFA to the data. *See* Petitioners' Jilin Case Brief at 18-19.

Jilin Bright Future argues that adverse facts available are not warranted in this case because the record demonstrates that Jilin Bright Future neither misrepresented nor misreported its production costs or its factors of production. Jilin Bright Future claims that it is a small, hard-working company that has devoted its limited resources without fail to responding to the questionnaire responses and cooperating with the verification in this investigation.

With respect to the daily production reports, Jilin Bright Future maintains that it submitted samples of its daily production reports to the Department in its August 25, 2006, supplemental response. *See* Jilin Bright Future's Consolidated Section C and D Supplemental Response, August 25, 2006, at page 22 and Exhibit S2D-31, Exhibit S2D-32, Exhibit S2D-34, and Exhibit S2D-34. Jilin Bright Future explains that it not only disclosed the existence of these daily production records to the Department, the daily production records served as the basis of Jilin Bright Future's standard consumption figures. Jilin Bright Future claims that disclosure of the daily production records in its responses rebuts petitioners' allegation that Jilin Bright Future claimed that "actual production records were not maintained." *See* Petitioners' Jilin Bright Future Case Brief at 1. Jilin Bright Future also notes that in the ZBF verification, the Department found that the daily production reports submitted in the response were derived from the same records as examined at verification. *See* ZBF Verification Report. Jilin Bright Future explains that its statement from its supplemental response of September 21, 2006, where it stated that "ZBF did not maintain product-specific consumption figures" is accurate because the daily production reports were not product-specific but rather measured the daily input of coal regardless of the number of products being produced that day. Jilin Bright Future concedes that it could have elaborated by explaining that daily production records existed, but maintains that the fact had already been established.

Concerning the question as to why Jilin Bright Future developed the standard consumption figures rather than using the input and output from the daily production reports, Jilin Bright Future claims that it explained to the Department that the product records are not product-specific in that several products may be produced in a single day and that the changeover from one type of product to the another may result in the consumption of additional quantities of coal which could not be attributed to a specific product type. According to Jilin Bright Future, by selecting consumption rates on production days limited to one product, it was submitting highly accurate data to the Department. Jilin Bright Future notes that a sample coal usage rate for 1000 iodine activated carbon the Department examined at verification was very close to, but actually

slightly less than, the usage rate for products with 1000 iodine reported by Jilin Bright Future. Accordingly, Jilin Bright Future concludes that the verification report shows that the Jilin Bright Future actually over-reported its FOPs for coal by a small percentage.

Jilin Bright Future argues that it believed its reporting methodology was the most accurate way to measure the FOPs for coal on a product-specific basis. Although Jilin Bright Future recognizes that the Department may take issue with its reporting methodology for coal, Jilin Bright Future argues that there should be no basis for the application of adverse facts available in that its methodological choice was motivated by a desire to submit the most accurate data possible. Jilin Bright Future states that if the Department determines not to accept the FOPs for coal, it should adopt an alternative rationally related to Jilin Bright Future's actual production experience. Noting that the Department did not permit Jilin Bright Future to submit its daily production records at verification, Jilin Bright Future argues that the Department should adjust the reported coal FOPs by the percentage difference between what Jilin Bright Future reported and the sample the Department examined at verification. Alternatively, Jilin Bright Future suggests that the Department rely on Jilin Bright Future's total coal purchases during the POI.

Jilin Bright Future also dismisses Petitioners' arguments with respect to the second furnace and the identity of a U.S. customer. Jilin Bright Future argues that the fact that Jilin Bright Future has a second furnace, which may have produced some of the material sold during the POI, is not relevant because the Department's questionnaire explicitly requires respondents to report usage rates during the POI. Jilin Bright Future claims that there is no case where the Department has ever required respondents to report the factors of production based on the period when each product was produced. Moreover, Jilin Bright Future maintains that it properly reported its U.S. customers and Petitioners' arguments with respect to this issue are based on speculation only.

Department's Position:

We agree with Petitioners, and for the reasons explained below have determined to apply total adverse facts available to Jilin Bright Future for the final determination.

As discussed by Petitioners in their case brief, prior to the *Preliminary Determination*, Petitioners had urged the Department to apply total AFA to Jilin Bright Future on the grounds that Jilin Bright Future failed to provide reliable factors of production information. *See Preliminary Determination*, 71 FR at 59729-30. Petitioners argued that the information submitted by Jilin Bright Future was based on unsubstantiated and unexplained estimates based on aggregate allocations irrespective of product characteristics. *Id*.

In determining that the application of AFA with respect to Jilin Bright Future was not warranted in the *Preliminary Determination*, the Department stated:

> Jilin Bright Future notes that certain suppliers do not have complete, product-specific POI records, but the Department finds that its allocations are reasonable, given the records maintained by Jilin Bright Future's suppliers. Therefore, on the basis of the data submitted by Jilin Bright Future, which the Department intends to carefully scrutinize at verification, the Department preliminarily determines that the use of total adverse facts

available is not warranted for the preliminary determination. *Id.* at 59729 (emphasis added).

Thus, the Department made clear that it was accepting Jilin Bright Future's FOP allocations based on Jilin Bright Future's questionnaire responses and the data submitted therein. Moreover, the Department made clear that it intended to carefully scrutinize the information at verification. Shortly after the *Preliminary Determination*, the Department notified Jilin Bright Future that it would be verifying the FOP information submitted by Jilin Bright Future's affiliated supplier, ZBF. *See* October 27, 2006, letter to Jilin Bright Future Industry and Commerce Co., Ltd. and Jilin Bright Future Chemicals Co., Ltd. transmitting the verification outline for ZBF. In its verification of ZBF, the Department found that the actual information and data maintained by ZBF for its most critical inputs contradict Jilin Bright Future's record statements regarding the information maintained by ZBF in its normal books and records. We first review ZBF's FOP reporting methodology and then the Department's verification findings at ZBF.

ZBF's FOP Reporting Methodology

The FOP inputs reported by ZBF as utilized in the production of activated carbon included feedstock coal (*i.e.*, coal used as a raw material), coal for energy, water, electricity, and labor. With respect to ZBF's two most important inputs, Jilin Bright Future explained that energy coal consumption was calculated based on observation, while feedstock coal consumption was based on the standard consumption amount, adjusted by the actual coal consumption. *See* Jilin Bright Future's August 25, 2006, supplemental questionnaire response ("Jilin First Supplemental Questionnaire Response) at 19-20 and 25.

To calculate the FOPs for these inputs, Jilin Bright Future first allocated steam coal between feedstock coal and coal for energy. Jilin Bright Future stated that "because all coal {p}urchased were used to produce activated carbon, as raw material or fuel, ZBF did not keep records of how much coal were picked out as raw material and how much was left as fuel in the ordinary course of business." *See* Jilin First Supplemental Questionnaire Response at 25 (emphasis added). Accordingly, Jilin Bright Future explained that ZBF calculated its consumption of energy coal "based on its observation of consumption quantity of energy coal per day." *See* Jilin Bright Future's September 21, 2006, supplemental questionnaire response ("Jilin Second Supplemental Questionnaire Response") at 5. After estimating the amount of steam coal used for energy, which was assumed by Jilin Bright Future to be constant for each month of the POI where there was production, Jilin Bright Future estimated the total POI consumption of feedstock coal as the total consumption of steam coal during the POI minus the estimated POI consumption of energy coal. *Id.* at 5-6.

To report product-specific (*i.e.*, products with different iodine numbers) FOPs for feedstock coal, Jilin Bright Future stated that ZBF used standard consumption figures because "ZBF did not maintain records of product-specific consumption figures…." *See* Jilin Second Supplemental Questionnaire Response at 4. In response to the Department's question as to how these standards were developed, Jilin Bright Future explained that "ZBF derived the standard consumption figures from the actual input of raw material coal and output of product with a specific iodine number per day when the production had been in the stable state." *See* Jilin First Supplemental Questionnaire Response at 22. At Exhibits S2 D31-D34 of its First Supplemental Questionnaire

Response, Jilin provided the production records from which these standard consumption figures were calculated (there was one daily record for each of the four products). After developing the standard consumption figures for feedstock coal, Jilin Bright Future adjusted these standards by the "actual" feedstock coal consumption, which, as explained above, was derived based on the total consumption of steam coal minus the estimated consumption of energy coal. Monthly steam coal consumption, Jilin Bright Future explained, was calculated by ZBF "as the quantity of steam coal remain{ing} at the end of the last month plus the quantity of steam coal purchased during the current month minus the quantity of steam coal remain{ing} at the end of the current month." *See* Jilin Bright Future Second Supplemental at 16.

ZBF Verification Findings

At the verification of Jilin Bright Future's affiliated supplier, ZBF, the Department found that ZBF does and did maintain its books and records in a manner that would have permitted it to provide actual FOP data rather than the standards-based allocations it did provide. Specifically, the "Summary of Issues" section of the Department's verification reported stated that:

1. We found that ZBF has two activation furnaces: an STK and an SLEP furnace. We noted that during the POI, there was only production activity in the STK furnace.

2. We found that ZBF maintained actual daily production reports for the STK furnace, the only furnace in operation during the POI, for the period covering the POI which recorded the amount of coal inputted for each shift and the amount of activated carbon outputted. We noted that the output listed the iodine level, ash content, and apparent density of the activated carbon.

3. We found that ZBF maintained actual daily production records for the boiler room for the period covering the POI which recorded by shift how many wheel barrows of coal went into the boiler. Company officials explained that one wheel barrow holds approximately 200 kilograms ("kg") of coal. *See* ZBF Verification Report at 2.

Issues 2 and 3 are in sharp variance with Jilin Bright Future's statements that "ZBF did not keep records of how much coal were picked out as raw material and how much was left as fuel in the ordinary course of business." *See* Jilin First Supplemental Questionnaire Response at 25.

Regarding the consumption of feedstock coal, during a tour of ZBF's production facility the verification team observed that ZBF records the consumption of feedstock coal into the furnace. As the verification report explains:

> In the steam boiler room, we observed a book that recorded the input/output into the furnace for the day. Company officials explained that for each shift for each day (there are three shifts, they noted) for each furnace they record the amount of material inputted and the amount outputted. In response to our query, company officials noted that they have a scale that measures the quantity inputted and outputted into the furnace. *See* ZBF Verification Report at 5-6.

The verification team then found that ZBF maintained the aforementioned production reports for every day of the POI and that these reports were "identical in format to the documents upon which Jilin Bright Future calculated the 'standard' coal figure and which we observed in the boiler room." *Id*. at 7 and ZBF Verification Exhibit 4.

In response to the verification team's query as to why the company did not use the daily furnace reports from the entire POI to report the consumption factor of coal for use in the furnace, a company representative first reported that "he thought the Department wanted the amount purchased rather than the amount consumed because the consumption amount does not capture loss if some coal is blown away or stolen." *Id*. at 8. Verification officials noted that "the Department requests consumption amounts in the questionnaire" and that the standard used by the company was derived from these same records." *Id*. Later in the verification, the company representative claimed that "he chose the methodology he did because there were several times during the POI when the product mix shifted (*e.g.,* from 850 iodine level to 1000 iodine level) and the usage factor was 'unstable,' which he intimated meant periods where production was not continuous and smooth." *Id*.

Although company officials requested to be permitted to present a worksheet which they claimed demonstrated that the actual consumption figures based on the daily production records are the same as the "stable period" figures ZBF reported, the Department refused to accept such information as:

> (1) to do so would have been to place on the record a significant amount of non-minor new information Jilin Bright Future's responses stated did not exist, which was a finding of this verification at sharp variance with statements on the record, and (2) ZBF's failure to report the existence of this information was a deliberate, methodological choice rather than an oversight or some other error. *Id*.

In addition to finding that ZBF maintained product-specific records for feedstock coal, the verification team found that ZBF maintained similar daily production records which recorded by shift how many wheelbarrows / pushcarts of coal went into the boiler for each day. *Id*. at 9. Company officials stated that one wheelbarrow generally holds about 200 kg of coal. *Id*. The verification team did not accept the daily POI production records from the Boiler Room for the same reasons it did not accept the new information on the feedstock coal. *Id*. at 10.

Issue 1 of the ZBF Verification Report concerns the Department's finding that ZBF had two furnaces during the POI despite Jilin Bright Future's indications that ZBF had one furnace during the POI. *See* Jilin Bright Future's July 24, 2006, Section D questionnaire response at D-3 and Exhibit D-ZY-1 (production process diagram). Although further verification demonstrated that this second furnace, which differed from the first furnace in that it activated only *(i.e.*, the coal must be carbonized prior to inputting it into the furnace), was not utilized during the POI, Jilin Bright Future officials indicated that merchandise sold under certain invoices was likely produced by the second furnace prior to the POI. *Id*. at 5-7. Accordingly, because of Jilin Bright Future's failure to disclose the existence of this additional furnace, the Department and Petitioners were deprived of the opportunity to consider the appropriate FOPs for these products. This finding, along with the Department's findings that ZBF maintained actual production

reports for feedstock coal and energy coal, raise serious concerns as to the accuracy and completeness of the ZBF FOP response submitted by Jilin Bright Future.

Analysis

As demonstrated above, the record clearly indicates that Jilin Bright Future determined to report coal consumption (both feedstock and energy) for ZBF based on allocations and estimations rather than actual daily production records maintained by ZBF which precisely recorded the usage quantity (*i.e.*, in the case of feedstock coal, ZBF weighed the input quantity of coal and the output activated carbon and for energy coal, ZBF recorded the number of wheelbarrows of coal entered into the steam boiler). The reporting methodology selected by Jilin Bright Future to report ZBF's FOPs is not in accordance with the Department's questionnaire instructions. Specifically, the Department's standard questionnaire requests that respondents report the actual factors of production used during the POI to produce each unique model or product type in the U.S. market sales listing. *See, e.g*, May 19, 2006, letter to Jilin Province Bright Future Chemicals Co. Ltd. and Jilin Province Bright Future Industry & Commerce Co. Ltd. transmitting the antidumping questionnaire ("Original Questionnaire") at D-1. Moreover, the questionnaire makes clear that the information reported should be based on the consumption amount to produce one unit of the merchandise under investigation. *Id*. at D-7. Nevertheless, because Jilin Bright Future reported that ZBF did not maintain records of product-specific consumption figures and that it did not separately track the consumption of feedstock coal and energy coal, at the *Preliminary Determination* the Department determined to rely on the FOP data provided by Jilin Bright Future because it was the best available information. *See Preliminary Determination*, 71 FR at 59729. However, in light of the Department's findings at verification that ZBF maintained production records that would have permitted it to report product-specific consumption figures for the POI, it is necessary to reconsider our finding in the *Preliminary Determination*.

We first consider respondent's arguments that the methodology it used was the most accurate way to measure the FOPs for coal on a product-specific basis. As an initial matter, we agree with Jilin Bright Future that the basis of its calculation of the standard consumption figures for feedstock coal were the same daily furnace production reports examined by the Department at verification. We disagree however that the methodology selected was accurate because each standard was calculated based on only one day's worth of data rather than the entire POI, which was available to Jilin Bright Future and which the Department's questionnaire specifically requests. Also, contrary to respondent's claims, we do not find that the questionnaire responses submitted by Jilin Bright Future establish that ZBF maintained these daily production reports for every day of the POI. Rather, Jilin Bright Future claimed in its questionnaire responses that ZBF did not maintain product-specific records. Respondent has argued that while the standards it developed are product-specific, the use of the daily furnace reports covering the entire POI are not product-specific, despite being generated from identical records. Specifically, respondent argues that the daily furnace reports are not product-specific because they measure the daily input of coal regardless of the number of products being produced that day and that the changeover from one type of product to another may result in the consumption of additional quantities of coal which could not be attributed to a specific-product type. A review of even the sample daily furnace reports submitted in the response reveals that they are product-specific in that they record the input quantity of coal and the output quantity of activated carbon by iodine

level, ash content, and apparent density for each shift.[40] *See, e.g*, Jilin First Supplemental Questionnaire Response at Exhibits S2 D31-D34. There are no un-attributable quantities of coal. To the extent that respondent wanted to argue that the "changeover" to different products in the furnace during the POI would create distortions, it was incumbent upon respondent to first notify the Department that, while it maintained daily furnace reports for every day of the POI from which it could report feedstock coal consumption on a product-specific basis, it believed their use was not appropriate because of the alleged distortion from the changeover. Respondent's failure to inform the Department of the existence of these records for every day of the POI and the manner in which the records were kept prevented both the Department and Petitioners from evaluating its claim. As the record exists now, there is no information to support an argument that the use of POI daily furnace reports to report feedstock coal consumption would have resulted in a distortion. The record evidence does, however, indicate that the methodology used by Jilin Bright Future to report ZBF's main factor inputs of feedstock coal and energy coal was based on incomplete data despite the existence of complete POI data on the consumption of both feedstock coal and energy coal. With respect to energy coal, we note that Jilin Bright Future has not presented any argument as to why the use of the POI daily boiler reports would not be more accurate than the estimation of energy coal consumption based on observation. The information collected by the Department at verification indicates that, far from being constant, energy coal consumption at the boiler differed significantly over three different days. *See* ZBF Verification Report at 9 and ZBF Verification Exhibit 5. Having found that the FOP methodology used by Jilin Bright Future for its affiliated supplier ZBF is not supported by substantial evidence, we next consider whether the application of facts available is appropriate.

Facts Available

Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act provides that if an interested party or any other person: (A) Withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title. Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(d) further states that if the party submits further information that is unsatisfactory or untimely, the administering authority may, subject to subsection (e), disregard all or part of the original and subsequent responses. Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (2) the

[40] Each of these characteristics was included by the Department in defining the control number. *See* May 10, 2006, Letter to Interested Parties, Re: Product Characteristics for the Antidumping Investigation of Certain Activated Carbon from the People's Republic of China.

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 in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

In the instant case, we find that the application of facts available is warranted with respect to the FOPs reported on behalf of ZBF based on 776(a)(2)(A), (C), & (D) of the Act because Jilin Bright Future declined to submit actual product-specific, POI consumption amounts for feedstock coal and energy coal, the most important inputs into the production of activated carbon, and instead reported coal consumption amounts based on allocations and estimations. Jilin Bright Future withheld the actual POI consumption data for feedstock coal and energy coal despite the Department's request for such information in its questionnaire and supplemental questionnaires. *See* Original Questionnaire at D-1 and D-7; Jilin First Supplemental Questionnaire Response at 24-25; and Jilin Second Supplemental Questionnaire Response at 4-6. Moreover, Jilin Bright Future's failure to submit this data significantly impeded the proceeding because it prevented the calculation of an accurate margin based on information maintained in ZBF's normal books and records. As noted by Petitioners, the CIT has found that withholding or providing misleading information is grounds for the application of facts available under section 776(a). *See Shanghai Taoen*, 360 F. Supp. 2d at 1345. Finally, because Jilin Bright Future failed to provide complete and accurate data concerning coal consumption for the furnace and the boiler in its questionnaire responses, the Department was unable to verify the actual data. We note that although respondent attempted to submit the actual consumption records for coal at verification, the Department declined to accept the information as it represented a significant amount of non-minor new information (*i.e.*, there was a separate daily furnace report and boiler report for every day of the six-month POI) that Jilin Bright Future's responses stated did not exist and which it deliberately determined not to submit. As cited above, section 782(d) of the Act permits the Department to reject information that is untimely filed subject to subsection 782(e). We do not find that section 782(e) of the Actapplies because the information was not timely submitted by the deadlines established by the Department, the respondent did not demonstrate that it acted to the best of its ability to provide the requested information in that it maintained that it did not have this information, and the information could not be used without undue difficulty because the Department only discovered the existence of this information at verification.

As noted above, feedstock coal and energy coal are the two most critical inputs used by ZBF in the production of activated carbon. The evidence on the record demonstrates that these two inputs account for an overwhelming majority of Jilin Bright Future's cost of manufacture. *See* Petitioners' Jilin Case Brief at 4 and Attachment 1 (showing the percentage of Jilin Bright Future's total cost of manufacture represented by each input). Given their significance, we determine that the lack of usable and reliable data for feedstock coal and energy coal render the entire FOP response for ZBF unusable. We further determine that section 782(e) of the Act does not apply because: 1) Jilin Bright Future failed to submit the actual product-specific, POI consumption for feedstock coal and energy coal in its questionnaire responses despite requests

by the Department[41]; 2) the Department was unable to verify the actual coal consumption data maintained by ZBF because it only became aware of the existence of these records at verification; 3) the Department is unable to rely on the FOP data for ZBF because the FOPs for the key inputs are incomplete; 4) Jilin Bright Future did not act to the best of its ability because it deliberately determined to withhold actual consumption data for coal; and 5) the Department is unable to reconstruct ZBF's FOP response because the necessary information is not on the record. As noted by Petitioners, the CIT has found that section 782(e) of the Act is inapplicable where a party has failed to demonstrate, as Jilin Bright Future has, that it acted to the best of its ability in providing information and meeting the requirements established by the Department. *See Borden v. United States*, 4 F. Supp. 2d 1221, 1245-46 (CIT 1998).

Application of Adverse Facts Available

Section 776(b) of the Act provides that the Department, in selecting from the facts otherwise available, may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See also* SAA, at 870 (1994). The statute provides, in addition, that in selecting from among the facts available the Department may, subject to the corroboration requirements of section 776(c), rely upon information drawn from the petition, a final determination in the investigation, any previous administrative review conducted under section 751 (or section 753 for countervailing duty cases), or any other information on the record.

Pursuant to section 776(b) of the Act, the Department may use information that is adverse to the interest of that party when the party fails to cooperate by not acting to the best of its ability in responding to the Department's request for information. *See Nippon Steel*, 337 F. 3d at 1382. Further, section 776(b) of the Act authorizes the Department to use as AFA information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. In selecting a rate for adverse facts available, the Department selects a rate that is sufficiently adverse "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 Semiconductors*, 63 FR at 8909, 8932.

In the instant case, we have determined that, within the meaning of section 776(b) of the Act, Jilin Bright Future failed to cooperate by not acting to the best of its ability to comply with the Department's requests for complete and verifiable FOP data with respect to merchandise produced by ZBF, its affiliated supplier, and that the application of AFA is warranted. The Department finds that Jilin Bright Future failed to "put forth its maximum efforts to investigate and obtain the requested information from its records." *See Nippon Steel*, 337 F. 3d at 1383. Specifically, Jilin Bright Future failed to cooperate to the best of its ability because it withheld actual coal consumption records and misrepresented to the Department the information it did maintain in its books and records. Jilin Bright Future also failed to disclose the existence of a second activation furnace which prevented the Department from considering the appropriate FOPs to apply to certain sales. Jilin Bright Future has claimed that there is no basis for application of an adverse inference because its methodological selection was motivated by a

[41] Jilin Bright Future was provided several opportunities to correct its representations and reported data throughout the proceeding. Specifically, Jilin Bright Future submitted questionnaire responses on July 7, 2006, August 9, 2006, August 18, 2006, August 25, 2006, September 21, 2006, and October 18, 2006.

desire to submit the most accurate data possible. However, the Department notes that at no point in the investigation did Jilin Bright Future seek guidance on the applicable reporting requirements, as contemplated in section 782(c)(1) of the Act. Moreover, as noted above in the section "ZBF's FOP Reporting Methodology" and "ZBF Verification Findings," Jilin Bright Future indicated on several different occasions that it did not maintain documentation that it later admitted it did maintain. Despite the Department's very specific questions, Jilin Bright Future gave insufficient attention to its statutory duty to reply accurately and completely to requests from the Department and to provide an accurate and reliable factors of production database. Because Jilin Bright Future failed to do the maximum it was able to do based on data that it had in its possession, the Department finds that Jilin Bright Future failed to cooperate to the best of its ability, and that the application of AFA is warranted.

We agree with Petitioners that total AFA should be applied to Jilin Bright Future given that there is unusable FOP information for such a significant percentage of Jilin Bright Future's reported U.S. sales. *See* Petitioners Jilin Case Brief at 15 and Memorandum to the File: Jilin Province Bright Future Industry and Commerce Co., Ltd. and Jilin Second Supplemental Questionnaire Response at Exhibit S2-C-6 (U.S. sales database). We find that the application of partial AFA in this instance (*e.g.*, the application of the highest reported factor) would not provide an appropriate incentive for more accurate and complete reporting. The application of total AFA in this instance is also consistent with the Department's practice of applying total AFA when the missing information affects a significant portion of the reported sales, as it does in the case of Jilin Bright Future. *See* Artist Canvas Issues and Decision Memo at Comment 11.

Selection of the Adverse Facts Available Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from: (1) the petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record. In the *Preliminary Determination*, the Department applied as AFA to the PRC-wide entity the highest corroborated rate from the petition. *See Preliminary Determination*, 71 FR at 59731. The Court of International Trade and the Federal Circuit have consistently upheld the Department's practice. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990) ("*Rhone Poulenc*"); *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55% total AFA rate, the highest available dumping margin from a different respondent in an less than fair value investigation); *see* also *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 689 (2000) (upholding a 51.16% total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); *Shanghai Taoen*, 360 F. Supp. 2d at 1345 (upholding a 223.01% total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse "as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner." *See Semiconductors*, 63 FR at 8909, 8932. The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* SAA at 890. *See* also *Notice of Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater*

Shrimp from Brazil, 69 FR 76910, 76912 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 22. Consistent with the Department's practice and the purposes of section 776(b) of the Act, as AFA, we are applying a rate of 228.11 percent to Jilin Bright Future.

Corroboration

Section 776(c) of the Act requires that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described in the SAA as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." *See* SAA at 870. The SAA also states that the independent sources may include published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *Id*. The SAA also clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* As noted in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. Petitioners' methodology for calculating the export price and normal value in the petition is discussed in the initiation notice. *See Initiation of Antidumping Duty Investigation: Certain Activated Carbon From the People's Republic of China*, 71 FR 16757 (April 4, 2006).

We corroborated the AFA margin selected in the *Preliminary Determination* by comparing the margin selected to the margins we found for the respondents. *See Preliminary Determination*, 71 FR at 59731-2. As discussed in the Memorandum to the File regarding the corroboration of the AFA rate, dated February 23, 2007, we continue to find that the margin of 228.11 percent has probative value. *See* Memorandum to the File from Catherine Bertrand, Senior Case Analyst, AD/CVD Operations, Office 9: Corroboration of the Facts Available Rate for the Final Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China, dated February 23, 2007. Accordingly, we find that the rate of 228.11 percent is corroborated within the meaning of section 776(c) of the Act. Consequently, we are applying 228.11 percent as the single antidumping rate to Jilin Bright Future.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final determination of the investigation and the final weighted-average dumping margins in the *Federal Register*.

AGREE_____ DISAGREE_____

_____
David Spooner
Assistant Secretary
for Import Administration

_____
Date