

that he could e-mail it to CITIC. The Department sent CITIC's counsel an electronic copy of the letter on August 19, 2003, requesting that CITIC file its response no later than August 22, 2003. See Memorandum to the File, from Michael Holton, Case Analyst, through James Doyle, Program Manager, regarding Request for Release from APO of Supplier's C Name, dated August 28, 2003. On August 22, 2003, the Department did not receive a response from CITIC regarding the information the Department requested.

On August 27, 2003, the Department made a final request that CITIC respond to the letter sent on August 12, 2003. Despite the Department's best efforts to provide CITIC with every opportunity to respond to our requests, we did not receive a response to the letter originally sent out on August 12, 2003, nor has the Department received the FOP information necessary to calculate the a normal value.

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 Department; (B) fails to provide such information in a timely manner or in the form or manner requested under the antidumping statute; (C) significantly impedes an antidumping review; or (D) provides such information but the information cannot be verified, the Department shall use the facts otherwise available in reaching the applicable determination as provided in Section 782 (d) of the Act. See *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Order in Part*, 64 FR 30481 (June 8, 1999); *Silicon Metal From The People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 63 FR 37850 (July 14, 1998); *Silicon Metal From The People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 63 FR 11654 (March 10, 1998). CITIC and its suppliers, as "interested parties," have failed to respond and CITIC has engaged in pattern of non-compliance in submitting its responses to the Department's request for information, which have impeded the Department's best efforts in conducting this review. Specifically, CITIC failed to either report or supply the Department with FOP information. For these reasons, the Department finds that use of facts otherwise available is appropriate for these preliminary results.

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 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 Department with respect to the information, and (5) the information can be used without undue difficulties.

For the Department to calculate an accurate margin in an NME proceeding, it needs valid FOP information. CITIC and its suppliers failed to provide the FOP information for the transactions. There has been no alternative or substitutable information suggested for use in place of the missing FOP data. Therefore, in cognizance of CITIC's submission of section A and section C response, we find that the submitted data is nevertheless so incomplete that reliance on it would not result in an accurate measurement or reflection of CITIC's selling practices. Further, as detailed above, CITIC and its suppliers had ample time and extraordinary number of opportunities to submit the requested FOP data for this review and the requested explanation as to its efforts to secure responses from the suppliers, but they failed to do so.

Section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA), establishes that the Department may employ an adverse inference "... to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. It also instructs the Department, in employing adverse inferences, to consider "... the extent to which a party may benefit from its own lack of cooperation." *Id.*

When determining whether a company has acted to the best of their ability the Department "must make an

objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations;" and "a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." See *Nippon Steel Co. v. U.S.*, 337 F.3d 1373 (Fed Cir 2003) ("*Nippon*").

In this particular case, CITIC and its suppliers failed to respond to several of the Department's requests for information for which they should have known the Department would need to conduct this administrative review. We note that CITIC participated in the investigation only two years ago and one of its suppliers during this review also participated in that investigation. See Memorandum to the File, from Michael Holton, Case Analyst, through James Doyle, Program Manager, regarding CITIC's Suppliers in the Investigation, dated September 23, 2003. Therefore, the Department finds that, by not providing the necessary responses to the questionnaires issued by the Department, CITIC and its suppliers have failed to cooperate to the best of its ability.

First, FOP information is fundamental for calculating the a dumping margin. Section 771(35)(A) of the Act, requires that dumping margins are calculated by comparing the NV to the export price or constructed export price. For NME countries, the Act states that the NV is determined "on the basis of the value of the factors of production utilized in producing the merchandise." See section 773(c)(1) of the Act. Because this is an NME proceeding, it is necessary that the Department have valid FOP information in order to calculate the NV. In cases such as this, we are precluded from reviewing the FOP of the suppliers, and absent any FOP information provided, the Department cannot simply create or postulate the costs of the uncooperative suppliers. In addition, the Department has no other FOP information on the record. Because CITIC and its suppliers have failed to provided FOP information for this administrative review the Department cannot properly calculate a dumping margin in accordance with section 773(c)(1) of the Act. See *Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate from*