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Administrative Review
POR: 08/02/2010-12/31/2010
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April 9, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for Certain Magnesia Carbon Bricks from the People's Republic of China: Final Results of the 2010 Administrative Review

SUMMARY

The Department of Commerce (the Department) has analyzed the comments submitted in the 2010 countervailing duty administrative review of certain magnesia carbon bricks (Bricks) from the People's Republic of China (PRC). After reviewing the comments and information received on the Preliminary Results,[1] we have made no change for the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this review on which we received comments subsequent to the Preliminary Results.

Comment 1: Application of Adverse Facts Available (AFA) to Fengchi for its Failure to Report Period of Review (POR) Information for Magnesia Alumina Carbon Bricks (MACBs)

Comment 2: Selection of the Appropriate AFA Rate to Assign to Fengchi and Corroboration of That Rate

Comment 3: Corrections to the Department's Draft Customs Instructions

[1] See Certain Magnesia Carbon Bricks From the People's Republic of China: 2010 Countervailing Duty Administrative Review, 77 FR 61397 (October 9, 2012) (Preliminary Results) and accompanying Preliminary Decision Memorandum. This is the first administrative review of this case and the period of review (POR) is August 2, 2010, through December 31, 2010.

Comment 4: Petitioner's Untimely Withdrawal Request

We also describe the methodology used to determine the total AFA rate applied to the mandatory respondents in this review under "Discussion of the Methodology" section below. We similarly recommend that you approve the positions described in that section.

BACKGROUND

On October 9, 2012, the Department published the Preliminary Results, determining that Fengchi Imp. and Exp. Co., Ltd. of Haicheng City and Fengchi Refractories Co., of Haicheng City (collectively, Fengchi), and Yingkou Bayuquan Refractories Co., Ltd. (BRC) failed to cooperate to the best of their ability in this proceeding.[2] BRC informed the Department, on March 27, 2012, that it would not be participating in this review.[3] Fengchi failed to respond within the established deadlines and significantly impeded the proceeding by refusing to respond to the Department's questionnaire with respect to its sales of certain MACBs that were ruled to be within the scope of the Order.[4] As a result, we relied on AFA for BRC and Fengchi in the Preliminary Results.[5]

In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on our Preliminary Results.[6] On October 31, 2012, the Department tolled all administrative deadlines by two days.[7] On November 13, 2012, the Department received the case briefs from (1) Petitioner,[8] (2) the Government of the People's Republic of China (GOC), and (3) Fengchi and Fedmet Resources Corporation (Fedmet), the latter of which is an importer of subject merchandise.[9] On November 19, 2012, the Department received rebuttal briefs from Petitioner, Fengchi and Fedmet, and ANH Refractories Company (ANH).[10]

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[2] Id. and accompanying Preliminary Decision Memorandum at 6-7.
[3] See Letter to the Department from Vesuvius Advanced Ceramics (Suzhou) Co. Ltd. and BRC "Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China; Administrative Review (8/2/10-12/31/10)," (March 27, 2012) (BRC Non-Response Letter) at 1.
[4] See Certain Magnesia Carbon Bricks from the People's Republic of China: Countervailing Duty Order, 75 FR 57442 (September 21, 2010) (Order).
[5] See Preliminary Results, and accompanying Preliminary Decision Memorandum at 6-7.
[6] Id., 77 FR at 61399.
[7] As explained in the memorandum from the Assistant Secretary for Import Administration, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29 through October 30, 2012. Thus, all deadlines in these segments have been extended by two days. See Memorandum to the Record, from Paul Piquado, Assistant Secretary for Import Administration, "Tolling Administrative Deadlines as a Result of the Government Closure During Hurricane Sandy," (October 31, 2012).
[8] Resco Products, Inc.
[9] See Certain Magnesia Carbon Bricks from the People's Republic of China: Petitioner's Case Brief (November 13, 2012); see also Certain Magnesia Carbon Bricks from the People's Republic of China: Fengchi's and Fedmet's Case Brief (November 13, 2012) (Fengchi and Fedmet Case Brief); see also Certain Magnesia Carbon Bricks from the People's Republic of China: GOC's Case Brief (November 13, 2012).
[10] See Certain Magnesia Carbon Bricks from the People's Republic of China: Petitioner's Rebuttal Brief (November 19, 2012); see also Certain Magnesia Carbon Bricks from the People's Republic of China: Fengchi's and Fedmet's Rebuttal Brief (November 19, 2012); see also Certain Magnesia Carbon Bricks from the People's Republic of ANH Refractories Company's Rebuttal Brief (November 19, 2012).

SCOPE OF THE ORDER

The scope of the order includes certain chemically-bonded (resin or pitch), magnesia carbon bricks with a magnesia component of at least 70 percent magnesia (MgO) by weight, regardless of the source of raw materials for the MgO, with carbon levels ranging from trace amounts to 30 percent by weight, regardless of enhancements (for example, magnesia carbon bricks can be enhanced with coating, grinding, tar impregnation or coking, high temperature heat treatments, anti-slip treatments or metal casing) and regardless of whether or not antioxidants are present (for example, antioxidants can be added to the mix from trace amounts to 15 percent by weight as various metals, metal alloys, and metal carbides). Certain magnesia carbon bricks that are the subject of the order are currently classifiable under subheadings 6810.11.0000, 6810.91.0000, 6810.99.0080, 6902.10.1000, 6902.10.5000, 6815.91.0000, 6815.99.2000 and 6815.99.4000 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, the written description is dispositive.

DISCUSSION OF THE METHODOLGY

Use of Facts Available and AFA

Sections 776(a)(1)and (2) of the Tariff Act of 1930, as amended (the Act), provide that the Department shall apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Furthermore, section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. In selecting an adverse inference, the Department may rely upon (1) secondary information, such as information derived from the petition, the final determination in the investigation, any previous administrative review, or (2) any other information placed on the record.[11]

Application of Total AFA to BRC and Fengchi

The Department selected BRC and Fengchi as mandatory respondents.[12] On March 27, 2012, BRC informed the Department that it would not respond to the CVD questionnaire for the POR.[13] Fengchi has repeatedly refused to respond to the CVD questionnaire for the POR.[14]

[11] See section 776(b) of the Act.
[12] See Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, "Administrative Review of the Countervailing Duty Order on Certain Magnesia Carbon Bricks (MCBs) from the People's Republic of China: Respondent Selection Memorandum," (February 21, 2012).
[13] See BRC Non-Response Letter at 1.

Based on the mandatory respondents' decision not to respond to the Department's questionnaire, the GOC informed the Department that it also would not respond to the CVD questionnaire.[15] In the Preliminary Results, we determined that BRC and Fengchi failed to cooperate to the best of their ability.[16] As stated in the Preliminary Results, we provided Fengchi and the GOC with a final opportunity to respond to the questionnaire by October 1, 2012, the deadline for the preliminary results of review.[17] Neither Fengchi nor the GOC responded by the final deadline. As a result, we continue to find that BRC and Fengchi withheld information requested by the Department in accordance with section 776(a)(2)(A) of the Act, and also failed to provide requested information by the established deadlines in accordance with section 776(a)(2)(B) of the Act. Furthermore, by refusing to participate in the review, the Department continues to find, in accordance with section 776(a)(2)(C) of the Act, that BRC and Fengchi significantly impeded the proceeding. Hence, the Department must conclude that these respondents failed to act to the best of their ability. Therefore, pursuant to section 776(b) of the Act, the Department has determined that, when selecting from among the facts otherwise available, an adverse inference is warranted with respect to BRC and Fengchi.

Selection of AFA Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1)-(2) 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 other information placed on the record. The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[18] 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."[19]

In applying AFA to BRC and Fengchi, we are guided by the Department's approach in recent CVD investigations and reviews.[20] Under this practice, the Department computes the total AFA

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[14] See, e.g., Letter to the Department from Fengchi "Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China; Administrative Review (8/2/10-12/31110)," (August 29, 2012); see also Preliminary Results, and accompanying Preliminary Decision Memorandum at 2-5.

[15] See, e.g., Letter to the Department from the GOC "GOC Notice of Review Status - First Administrative Review of the Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China (POR: 8/2/10-12/31/10)" (March 28, 2013); see also Letter to the Department from the GOC "GOC Response to Request for Initial Questionnaire Responses – First Administrative Review of the Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China (POR: 8/2/10–12/31/10)" (October 1, 2012).

[16] See Preliminary Results, and accompanying Preliminary Decision Memorandum at 6-7.

[17] Id.

[18] See, e.g., 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); see also Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. I, at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199.

[19] See SAA at 870.

[20] See, e.g., Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results of the Countervailing Duty Administrative Review, 77 FR 21744 (April 11, 2012) (Kitchen Racks), and accompanying

rate for non-cooperating companies generally using program-specific rates calculated for the cooperating respondents in the instant review or in prior segments of the instant case, or calculated in prior CVD cases involving the country under review (in this case, the PRC), unless it is clear that the industry in which the respondents operate cannot use the program for which these rates were calculated.

In these final results, for the income tax rate reduction or exemption programs, we are applying an adverse inference that the non-cooperating companies paid no income taxes during 2010. For programs other than those involving income tax rate reduction or exemption programs, we have first sought to apply, where available, the highest above de minimis subsidy rate calculated for an identical program from any segment of this proceeding. Absent such a rate, we have applied, where available, the highest above de minimis subsidy rate calculated for a similar program from any segment of this proceeding. Absent an above de minimis subsidy rate calculated for the same or similar program in any segment of this proceeding, under our AFA approach, the Department applies the highest above de minimis, calculated subsidy rate for any program from any CVD proceeding involving the country in which the subject merchandise is produced, so long as the producer of the subject merchandise or the industry to which it belongs could have used the program for which the rates were calculated.[21] We continue to find, on the basis of AFA, the countervailable subsidy rate for BRC and Fengchi to be 262.80 percent ad valorem.

Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is "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."[22] The Department considers information to be corroborated if it has probative value.[23] To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not

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Issues and Decision Memorandum at "Non-Cooperative Companies" section; see also Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 76 FR 18521 (April 4, 2011), and accompanying Issues and Decision Memorandum (Aluminum Extrusions from the PRC Decision Memorandum) at "Application of Adverse Inferences: Non-Cooperative Companies" section; see also Galvanized Steel Wire From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 77 FR 17418 (March 26, 2012), and accompanying Issues and Decision Memorandum at "Non-Cooperative Companies" section; see also Circular Welded Carbon-Quality Steel Pipe From India: Final Affirmative Countervailing Duty Determination, 77 FR 64468 (October 22, 2012), and accompanying Issues and Decision Memorandum at "Selection of the Adverse Facts Available Rate."

[21] See Aluminum Extrusions from the PRC Decision Memorandum at "Application of Adverse Inferences: Non-Cooperative Companies" section; see also Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008), and accompanying Issues and Decision Memorandum at "Selection of the Adverse Facts Available Rate" section.

[22] See SAA at 870.

[23] Id.

prove that the selected facts available are the best alternative information.[24] With regard to the reliability aspect of corroboration, we note that the rates on which we are relying were calculated in recent CVD final investigations or final results of review. Further, the calculated rates were based upon information about the same or similar programs. Moreover, no information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. Finally, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.

With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy rate. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it.[25]

In the absence of record evidence concerning these programs resulting from the non-cooperative companies' decision not to participate in the review, we have reviewed the information concerning PRC subsidy programs in other cases. For those programs for which the Department has found a program-type match, we find that, because these are the same or similar programs, they are relevant to the programs under review in this case. For the programs for which there is no program-type match, we have selected the highest calculated subsidy rate for any PRC program from which the non-cooperative companies could receive a benefit to use as AFA. The relevance of these rates is that they are actual calculated CVD rates for a PRC program from which the non-cooperative companies could actually receive a benefit. Further, these rates were calculated for periods close in time to the POR in the instant case. Moreover, the failure of these companies to respond to requests for information has "resulted in an egregious lack of evidence on the record to suggest an alternative rate."[26] Due to the lack of participation by the non-cooperative companies and the resulting lack of record information concerning their use of programs under review, the Department has corroborated the rates it selected to the extent practicable. The Department has provided a more detailed discussion of the AFA rates selected for each program under review in the Final AFA Memorandum.[27]

[24] Id. at 869.
[25] See Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (February 22, 1996).
[26] See Shanghai Taoen Int'l Trading Co., Ltd. v. United States, 360 F. Supp. 2d 1339, 1348 (CIT 2005).
[27] See Memorandum to Nicholas Czajkowski, Acting Program Manager "Final Results of the Countervailing Duty Administrative Review of Certain Magnesia Carbon Bricks from the People's Republic of China: Application of Adverse Facts Available for Non-Cooperative Companies" (Final AFA Memorandum) dated concurrently with this memorandum.

DISCUSSION OF THE ISSUES

Comment 1: Application of Adverse Facts Available (AFA) to Fengchi for its Failure to Report Period of Review POR Information for Magnesia Alumina Carbon Bricks (MACBs)

Fengchi and Fedmet

- Fengchi should not be required to report sales of MACBs because 19 CFR 351.225(l)(4) states that the Department will normally collect information on sales of products ruled to be in-scope only if the scope ruling is issued within 90 days of initiation of the review. The Department requested that Fengchi respond to the questionnaire with respect to its sales of MACBs 289 days after the initiation of the review.

- The Department could have issued a timely request to Fengchi to report information on its sales of MACBs at the outset of the review in the original questionnaire based on the then-pending scope ruling request filed by Fedmet. Instead, the Department waited until after announcing the final results of its scope inquiry before requiring Fengchi to undertake the burden of reporting sales of merchandise that might not be found to be within scope.

- In the Preamble to the Department's final regulations, a commentator requested that the Department extend the 90-day deadline in the case of an extended preliminary determination, but the Department declined to adopt this suggestion, stating that this would only occur late in the investigation process and "well after the expiration of 90 days" and therefore could not be implemented in a way that would allow the Department to request and receive information in a timely manner.[28]

- The Department's interpretation of 19 CFR 351.225(1)(4) is erroneous. The regulation does not mean that where the Department determines there is sufficient time, and thus requests that parties provide information, the Department may apply facts available with an adverse inference to those parties who fail to provide the requested information. This interpretation contradicts the regulation which states that the Department may determine whether or not it is practicable to include such sales within the ongoing review up until 90 days after initiation. After 90 days, the regulation provides that it is too late in the review process to collect the information and directs the Department to apply non-adverse facts available.

- Petitioner is also erroneous in its interpretation that the final sentence of 19 CFR 351.225(1)(4) gives the Department authority to request information on sales of MACBs beyond the 90-day deadline. The sentence in questions simply provides that the Department need not wait for the final result of a scope inquiry in order to request

[28] See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27330 (May 19, 1997).

information on a product that is subject to a pending scope ruling request and is not an exception to the 90-day limitation on including the results of scope rulings in reviews.

- The Department's regulations with respect to the 90-day rule have the force of law and are binding upon the Department, just as they are on the parties to this review.[29] Absent a compelling reason, the Department is obligated to follow its regulations.[30]

- The CBP data used by the Department to select respondents were limited to entries of bricks and did not include all entries of MACBs; therefore, the Department should have begun a new respondent selection process and issued quantity and value questionnaires to the companies for which a review was initiated after the final scope determination.

- Because neither Fengchi nor MACBs were investigated by the Department during the original investigation, Fengchi had not even begun to examine the programs that were subject to this review, let alone its participation in any of these programs. If Fengchi had attempted to comply with the Department's belated request to respond to the questionnaire with respect to MACBs, it would have been required to develop from scratch its response to the entire CVD questionnaire as if the review were beginning again only a few weeks before the deadline for the fully extended preliminary results.

- The Department's August 15, 2012 request that the respondents report sales of MACBs in the instant review imposed a substantial burden on the GOC because it had no way to know that a questionnaire response would be required of it prior to this date, especially considering that Fengchi filed a no-shipment certificate and BRC, the other mandatory respondent, informed the Department on March 27, 2012 that it would not be participating in the review.

- Even though the Department stated that there was sufficient time for the GOC and Fengchi to provide questionnaire responses, the review had progressed well beyond the 90-day cut-off date. Fengchi and the GOC could have timely responded to the Department's questionnaire regarding MACBs if the Department had followed its own regulations and issued a final scope determination within 120 days by August 31, 2011, two months before this administrative review was even initiated.

GOC

- Even though Fengchi reported that it had no exports of subject merchandise (as defined at the time) during the POR, and in spite of the fact that the Department knew that the scope request involving MACBs was pending at the time this review was initiated, the Department never requested that Fengchi (or the GOC) provide information related to MACBs during the nearly six-month period from February 21, 2012, to August 15, 2012.

[29] See Chang Tieh Industry Co. v. United States, 840 F. Supp. 141, 149 (CIT 1993) ("Regulations are laws. If they are valid they must be followed, until properly rescinded.").
[30] See NMB Singapore Ltd. v. United States, 780 F. Supp. 823, 827 (CIT 1991) ("The ITA is obliged to follow its regulations unless it provides a compelling reason for departure").

- The Department failed to ask for the information regarding MACBs, notwithstanding its clear prerogative to do so pursuant to 19 CFR 351.225(1)(4).

- The Department properly refrained from requiring Fengchi and the GOC to provide potentially unnecessary questionnaire responses because the scope question regarding MACBs was unsettled.

- The scope language included with the CVD questionnaire specifically recited certain history that is relevant to the original belief of all parties that MACBs were not included within the scope of this case.

- Although the scope language in the CVD questionnaire concludes with the typical refrain that "the HTS provisions are provided for convenience and customs purposes," the language of the scope in the questionnaire notes that revisions were made to the HTS numbers prior to the initiation of the review after discussions with a U.S. government expert on such products.[31]

- The scope description in the CVD Questionnaire mentions subheadings 6902.10.1000 and 6902.10.5000; however, no mention is made of subheading 6902.20 in the scope description, even though this subheading specifically relates to refractory bricks containing alumina.

- Prior to the Department's scope ruling, there was no reason to expect that Bricks containing alumina were at all relevant to this review. Even then, it was far from certain what the Department would do in view of the newly expanded scope of this review.

- The GOC abstained from seeking any further information about the subsidy programs that were the subject of the CVD Questionnaire since Fengchi steadfastly held to its views that it had no sales, shipments or entries of Bricks and that MACBs were not subject merchandise. The Department never took issue with Fengchi's position on this matter.

- The GOC confirmed with Department officials during the six-month hiatus in this review that absent any sales, shipments or entries by Fengchi, there was nothing for the GOC to provide in response to the Department's questionnaire.

- Having made a new scope determination at a very late stage in the proceeding, it defies logic to think that the GOC could under any circumstances collect and provide the substantial volume of information and documents required to adequately respond to the Department's questionnaire in the 14 days afforded the GOC to respond.

- In light of 19 CFR 351.225(1)(4) and given the advanced stage of this review, it is unreasonable and arbitrary to expect that the GOC could adequately participate by

[31] See the Department's Countervailing Duty Questionnaire (February 21, 2012) (CVD Questionnaire) at I-2.

undertaking the substantial work required to disseminate information and collect information from central, provincial, and local government agencies for the questionnaire response.

- Unless adequate time is afforded to the GOC to coordinate and collect data from the various agencies in order to complete a questionnaire response, it will be impossible to avoid prejudice to the mandatory respondent involved in this review.

Petitioner

- When read as a whole, 19 CFR 351.225(l)(4) establishes that the Department has flexibility in reviewing products ruled to be in-scope, either before or after the threshold of 90 days following initiation of a review. The decision on how to conduct the review rests with the Department, not with interested parties involved in the proceeding.

- MACBs fit the scope of the order and should have been reported from the outset of the review by Fengchi in its questionnaire response. The requirement of reporting MACBs is straightforward and not overly burdensome to Fengchi.

ANH

- With respect to the Department's authority to request information, 19 CFR 351.301 expressly states that the Department "may request any person to submit factual information at any time during a proceeding."

- The regulation that Fengchi cites to at 19 CFR 351.225(l)(4) is a rule to address when, and under what circumstances, the Department will order suspension of liquidation for products subject to a scope ruling proceeding, not the submission of factual information. Suspension of liquidation is important because it defines the universe of entries that will ultimately be subject to antidumping or countervailing duties. Specifically, 19 CFR 351.225(l)(4) allows the Department to use neutral facts available for the margin calculation for products ruled to be in-scope after 90 days of initiation of an administrative review, but does not limit the Department's authority to develop the record as it sees fit.

- Fengchi's reading of 19 CFR 351.225(l)(4) is overly narrow. Use of the word "may" in the second sentence of the regulation explicitly leaves it within the Department's discretion to determine how to proceed with respect to rulings issued more than 90 days after initiation of a review. In fact, the final sentence of the regulation states that the Department "may request information" concerning products subject to a scope inquiry "notwithstanding" a pending scope ruling, even if (not only if), the agency has not yet issued a ruling.

- The Department's request for MACB data was directly relevant to the review in determining subsidies received by Fengchi because the record shows that Fengchi had suspended entries under the Order during the POR. Moreover, even if MACBs are not

subject to the Order, the data on MACBs is relevant because the Department would have needed such data as part of its subsidy calculation. Fengchi errs in alleging that it, and not the Department, determines what information is relevant to a review.

- Fengchi's arguments that the Department's request required the review to start over are without merit. Fengchi had two months remaining before the Preliminary Results and eight months before the final results when the Department renewed its request. Fengchi had the ability to provide the information requested by the Department for timely completion of the review, but chose to withhold that information.

Department Position:
The Department disagrees with Fengchi regarding the interpretations of the Department's regulations and the Department's authority to request information. To incorporate the results of a scope ruling in an administrative review, 19 CFR 351.225(l)(4) states:

> "If, within 90 days of the initiation of a review of an order or a suspended investigation under this subpart, the Secretary issues a final ruling that a product is included within the scope of the order or suspended investigation that is the subject of the review, the Secretary, where practicable, will include sales of that product for purposes of the review and will seek information regarding such sales. If the Secretary issues a final ruling after 90 days of the initiation of the review, the Secretary may consider sales of the product for purposes of the review on the basis of non-adverse facts available. However, notwithstanding the pendency of a scope inquiry, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purposes of a review under this subpart."

The regulation speaks to when and under what circumstances the Department will order suspension of liquidation for products subject to a scope ruling proceeding; it does not address the submission of factual information. Suspension of liquidation is important because it defines the universe of entries that will ultimately be subject to antidumping or countervailing duties.

When read as a whole, the Department's regulation is consistent with the statutory intent for the Department to review and determine the amount of any countervailable subsidies.[32] The Department's regulations at 19 CFR 351.225(l)(4) creates two scenarios in which the Department may exercise its discretion to seek information regarding certain sales. If the scope ruling is issued within 90 days of initiation of the review, the Department will include sales of the product in question in its subsidies determination, as long as it is practicable. Accordingly, the Department will determine, in those cases, whether collecting that information is practicable. If more than 90 days have elapsed, the Department does not disregard those sales for purposes of the ongoing review. Instead, the regulation provides the Department with two options: (1) it may choose not to collect that information and rely instead on non-AFA as the basis for determining countervailable subsidies, even if collecting that information would still be practicable; or (2) it may seek information about subsidies related to those sales if it determines

[32] See section 751(a)(1) of the Act.

that it is appropriate to do so, as the Department did in this case. The express language of the regulation is stated in permissive terms; in no way was the regulation stated in proscriptive terms to prevent the Department from reviewing all entries of subject merchandise or from collecting relevant information to accurately calculate a subsidy rate. The regulation also provides no basis for a respondent to claim that the Department is limited to the application of non-AFA in making its determination for such sales where the Department has requested the information and the company has refused access to the information or impeded the review. Once the Department determines that there is sufficient time remaining in the review and requests the information, it equally has determined that the use of non-AFA in the post-90 days scenario under 19 CFR 351.225(l)(4) is not appropriate.

The preamble to the final regulation further clarifies the Department's intention in promulgating its regulation. The preamble summarizes the regulation as stating "that if the Secretary determines after 90 days of the initiation of a review that a product is included within the scope of an order or suspended investigation, the Secretary *may decline to seek sales information* concerning the product for purposes of the review."[33] This makes clear that the term "may" provides the Department with a choice as to whether to seek the information. Later, the preamble states ". . . paragraph (l)(4) makes clear that while the Department *may not collect information* regarding sales of a particular product, it will not disregard those sales for purposes of the ongoing review."[34] Here, given the context provided by the first statement, the term "may" is best understood as permissive, not proscriptive. Accordingly, we interpret the statement to mean, "the Department *may choose* not to collect information and use non-adverse facts available instead," rather than "the Department *will not* collect information and *must* use non-adverse facts available." Fengchi's interpretation, which adopts the latter reading, is too narrow and replaces the earlier explanation that the Secretary "may decline" to seek sales information with the requirement that the Secretary "*will* decline" to do so, contrary to the Department's intent as explained in the preamble to the final regulation.

The preamble's discussion of extending the 90-day period does not alter this analysis. In denying a request that the Secretary be able to extend the 90-day period if the Secretary extends the deadline for the preliminary results of a review, the preamble states, ". . . the decision to extend the time for a preliminary review determination often comes only a short time before the expiration of the normal time limit {to issue the preliminary review determination} and well after the expiration of 90 days {discussed in 19 CFR 351.225(l)(4)}. Therefore, we could not implement the proposal in a manner that would allow the Department to request and receive the needed additional information in a timely manner."[35] We recognize that the second part of this statement highlights questions of both practicability and fairness to affected respondent companies. However, we find that the facts of this case demonstrate that such information requests are not inherently impracticable or unreasonable, given that the Department's original questionnaire initially requested information on Fengchi's MACBs well before the preliminary

[33] See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR at 27330 (emphasis added).
[34] Id. (emphasis added).
[35] Id.

determination for purposes of determining the subsidy benefit.[36] Consequently, the concerns raised within the preamble discussion do not prohibit the Department from fully developing the record when it is able to do so in a timely and reasonable manner. The Department is keenly aware of the requirement for timely completion of reviews and carefully considered the practicality of its request in this review. However, as discussed below, the Department has determined, and Fengchi has demonstrated, that there was sufficient time to provide the needed additional information.

In contrast with the above analysis, we find that Fengchi's interpretation is too narrow and would allow sales of subject merchandise to bypass the Department's review, even when obtaining the necessary information would be practicable. Under Fengchi's interpretation, the Department is limited to applying non-AFA to those sales or not reviewing them at all. The latter outcome is inconsistent with the statutory intent that the Department should review all subject entries.[37] Such an outcome is also inconsistent with the preamble, which emphasizes that the Department "will not disregard those sales" in the review. Accordingly, we find that the term "may" indicates that the Department has discretion to collect actual sales and subsidy information *or* to apply non-AFA.

We agree with ANH that the appropriate regulation concerning time limits on the submission of factual information is 19 CFR 351.301, which grants the Department the authority to request any party to submit factual information at any time during a proceeding. As such, once the Department requested that Fengchi respond to the questionnaire, Fengchi had no basis to withhold information from the Department. While Fengchi could have presented both the information requested by the Department and arguments on how the information should be used, Fengchi chose not to provide the requested information and, therefore, impeded the Department's effort to develop the record as necessary to conduct this administrative review.[38]

With respect to Fengchi's other arguments that there was not sufficient time to collect MACB information to complete the review within the statutory deadlines due to the numerous challenges it faced, we also disagree. As noted in the Preliminary Results, on February 21, 2012, we issued our Respondent Selection Memorandum stating that we had selected Fengchi because it was one of the two largest exporters of subject merchandise based on CBP data.[39] In addition, we sent the CVD Questionnaire to the GOC with instructions to forward the questionnaire to BRC and Fengchi.[40] The questionnaire instructed the respondent companies to report information on government programs they may have used as well as their total sales

[36] See CVD Questionnaire at III-4 to III-5 (in which the Department requests information for respondent companies' *total* sales).
[37] See section 751(a)(1) of the Act.
[38] See Daewoo Elecs. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried & Mach. Workers, 6 F.3d 1511, 1516 (Fed.Cir.1993) (explaining that the Department is the "master" of antidumping and countervailing duty law and its interpretation of rules and regulations implementing a statutory provision or scheme is entitled to considerable deference); accord Smith–Corona Group v. United States, 713 F.2d 1568, 1571 (Fed.Cir.1983).
[39] See Memorandum to Barbara E. Tillman, Director AD/CVD Operations, Office 6 "Administrative Review of the Countervailing Duty Order on Certain Magnesia Carbon Bricks (MCBs) from the People's Republic of China: Respondent Selection Memorandum" at 5 (February 21, 2012).
[40] See CVD Questionnaire at 2 of the Cover Letter.

information.[41] Fengchi filed what it characterized as a questionnaire response on March 29, 2012, in which the company stated that it did not have entries of Bricks during the POR and that the CBP data upon which the Department was relying was erroneous.[42] On March 30, 2012, the Department issued a preliminary scope ruling that MACBs are within the scope of the Order.[43] Subsequent to the Department's preliminary scope ruling, on June 20, 2012, we placed on the record entry documents from CBP regarding Fengchi's POR entries and provided parties the opportunity to comment.[44] On July 2, 2012, the Department issued a final scope ruling that certain MACBs are within the scope of the Order.[45] In subsequent letters dated August 15, 2012, and September 11, 2012, we gave Fengchi and the GOC two additional opportunities to respond to the Department's original CVD questionnaire.[46] The Department indicated in both letters that we were willing to work with Fengchi and the GOC to accommodate any additional time they believed was needed to comply with the Department's request.[47] These circumstances indicate that Fengchi was on notice early in the process that its MACB sales during the POR could be subject to the administrative review. Moreover, although the GOC claims that Department officials indicated that there was nothing for it to do absent any sales, shipments, or entries by Fengchi, the GOC has not substantiated these claims. In light of the time afforded to Fengchi and the GOC, as well as our repeated offers to work with both on this matter, the Department finds that Fengchi had sufficient time to review its records and all of its entries of subject merchandise, including MACBs, during the POR and to submit the information requested by the Department.

Furthermore, we find no merit in Fengchi's argument that incorporating the review of MACBs required a new respondent selection process because MACBs were not considered at the time of respondent selection. The Department makes its determination of the largest exporters at an early point in time in the review based on the information available at that time because it must complete the review within the statutory framework.[48] As noted below in Comment 3, and by Fengchi itself, the impact of the Department's MACB scope ruling is limited to certain MACBs

[41] Id. at Section III.
[42] See Letter from Fengchi to the Department "Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China; Administrative Review (8/2/10-12/31/10)" (March 29, 2012).
[43] See Department's Memorandum "Certain Magnesia Carbon Bricks From the People's Republic of China and Mexico: Preliminary Scope Ruling - Fedmet Resources Corporation" (March 30, 2012).
[44] See Memorandum to All Interested Parties "Magnesia Carbon Bricks from the People's Republic of China (C-570-955): Requests for Entry Summaries from U.S. Customs and Border Patrol (CBP)" (June 20, 2012).
[45] See Department's Memorandum "Certain Magnesia Carbon Bricks From the People's Republic of China and Mexico: Final Scope Ruling - Fedmet Resources Corporation" (July 2, 2012).
[46] See Letter from the Department to Fengchi "First Administrative Review of the Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China: Fengchi Imp. and Exp. Co., Ltd. of Haicheng City's Inadequate Questionnaire Response (August 15, 2012); Letter from the Department to the GOC "First Administrative Review of the Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China: Fengchi Imp. and Exp. Co., Ltd. of Haicheng City's Inadequate Questionnaire Response" (August 15, 2012); Letter from the Department to Fengchi "First Countervailing Duty Administrative Review of Certain Magnesia Carbon Bricks from the People's Republic of China" (September 11, 2012); and Letter from the Department to the GOC "First Countervailing Duty Administrative Review of Certain Magnesia Carbon Bricks from the People's Republic of China" (September 11, 2012)
[47] Id.
[48] Similarly, the Department would not need to revisit its respondent selection decision if its scope ruling had been issued within 90 days of initiation of the review.

that were reviewed by the Department, and there is no record evidence that a new respondent selection would alter the results in any way. Fengchi's arguments that there were other entries of MACBs during the POR are speculative and unsubstantiated.

Finally, we disagree with Fengchi's argument that the timing of the Department's scope ruling on Fedmet's Bastion® magnesia alumina carbon bricks in a separate segment prevented it from timely responding to the Department's questionnaire in this review. As we explained in the Preliminary Decision Memorandum in great detail, we afforded Fengchi numerous opportunities to respond to the Department's questionnaire and tried to work with it so that the company would have ample time to gather information for its questionnaire response.[49] Indeed, once the Department notified Fengchi in an August 15, 2012 letter that it must respond to the questionnaire, the Department provided Fengchi with more time (47 days) to respond to the questionnaire than it had when it initially released the questionnaire on February 21, 2012 (37 days).[50] Thus, in light of the time afforded to Fengchi, the Department continues to find that Fengchi had sufficient time to review all of its records and all of its entries of subject merchandise during the POR and to submit a questionnaire response.

Section 776(a) of the Act provides that the Department shall apply "facts otherwise available" if (1) necessary information is not on the record or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Furthermore, section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

In light of the discussion above and Fengchi's uncooperative behavior, we continue to find that Fengchi withheld information requested by the Department, failed to respond within the established deadlines, and significantly impeded the proceeding by preventing our review of subsidies received by Fengchi during the POR. Accordingly, the Department has determined that it will rely on facts otherwise available pursuant to sections 776(a)(2)(A), (B), and (C) of the Act in order to determine an ad valorem subsidy rate for Fengchi. Additionally, Fengchi's refusal to provide information constitutes circumstances under which the Department can conclude that Fengchi has not cooperated to the best of its ability.[51] Therefore, when selecting from among the facts otherwise available, the Department has determined that an adverse inference is warranted with respect to Fengchi under section 776(b) of the Act.

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[49] Preliminary Decision Memorandum at 3-5, 6-7.
[50] Id. at 6-7.
[51] See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8911 (February 23, 1998); see also Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review, 70 FR 69937, 69939 (November 18, 2005); SAA at 870.

Comment 2: Selection of the Appropriate AFA Rate to Assign to Fengchi and Corroboration of That Rate

Fengchi and Fedmet

- The Department may rely on information derived from the investigation when selecting an AFA rate in accordance with section 776(b) of the Act; however, the courts have set certain guidelines and limits to the size of that rate. According to the ruling in Gallant Ocean, "an AFA rate must be 'a reasonably accurate' estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance."[52] The Gallant Ocean ruling also states that "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin."[53]

- In addition, the Court's ruling in Lifestyle Enterprise states that "the AFA rate selected by Commerce nevertheless must be supported by substantial evidence. Selection of an AFA rate based on minuscule data will not suffice. An AFA rate must not be aberrant or punitive, and should bear a rational relationship to respondent's commercial reality."[54] The ruling in Lifestyle Enterprise also states that more support is required by the Department to substantiate its selection of high AFA rates (e.g. "generally, a larger percentage of a party's sales data is needed to support a very high margin").[55]

- The 262.80 percent rate applied to Fengchi in the Preliminary Results by the Department is unreasonable, overly punitive, and not reflective of Fengchi's commercial reality. The rate is more than ten times higher than RHI's and the "All Others" rates calculated in the investigation.[56]

- Furthermore, Fengchi's AFA rate was largely derived by applying RHI's AFA investigation rate of 2l.24 percent from the "Export Restraints of Raw Materials" program to 11 individually alleged programs. However, RHI's overall rate for the investigation was 24.24 percent while the Department's calculation of Fengchi's rate was 262.80 percent. According to the ruling in Qingdao Taifa, with such an incredibly high margin, the Department needs to have much more corroborative information than it cited in the Preliminary Results in order to justify its application of AFA to Fengchi's rate.[57]

- The Department cannot simply cite the lack of record evidence as a reason for its corroboration finding. Moreover, because the 21.24 percent rate that the Department

[52] See Gallant Ocean (Thai.) Co. v. United States, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (Gallant Ocean) (quoting F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).
[53] Id., 602 F.3d at 1323.
[54] See Lifestyle Enterprise, Inc. v. United States, 865 F. Supp. 2d 1284, 1289 (CIT 2012) (Lifestyle Enterprise); see also Essar Steel Ltd. v. United States, 678 F.3d 1268, 1276 (Fed. Cir. 2012).
[55] See Lifestyle Enterprise, 865 F. Supp. 2d at 1290.
[56] See Order.
[57] See Qingdao Taifa Grp., Co. v. United States, 760 F. Supp. 2d 1379, 1386 fn. 7 (CIT 2010) (Qingdao Taifa) ("When rates are in multiples of 100%, one might assume that a bit more corroboration or record support is warranted").

applied to several Fengchi programs in the Preliminary Results was itself a rate derived from the investigation AFA rate and not calculated from information submitted by RHI, this rate is unreasonable on its face and is not designed to reflect commercial reality but to unfairly punish Fengchi.

Petitioner

- Although the Department sought to obtain and consider Fengchi's additional sales of subject merchandise precisely to be able to assess commercial reality, Fengchi did not provide the information requested.

- Because a rate close to 262.80 percent was applied in the investigation, Fengchi knew that the 262.80 percent rate was in play and nevertheless declined to provide details for all of its in-scope merchandise. It is reasonable to infer from Fengchi's actions that its true subsidy rate would have been comparable to the AFA rate assigned in the underlying investigation.

- The Department cannot apply the All-Others rate of 24.24 percent as AFA because it is too low to induce cooperation in future proceedings.

ANH

- The Department's methodology for calculating Fengchi's total AFA rate is consistent with the statute and the agency's prior practice.

- By refusing to provide any information that would enable the Department to determine whether, and to what extent, Fengchi received countervailable subsidies during the POR, Fengchi and the GOC left the Department with no choice other than to base Fengchi's rate on total AFA.

- In arguing that the AFA rate assigned to Fengchi is punitive, Fengchi's statement that RHI received a total AFA rate in the investigation is misplaced. Unlike Fengchi, RHI cooperated in the investigation, but received a partial AFA rate because the GOC failed to provide certain information. However, the Department assigned a total AFA rate that is comparable to the AFA rate assigned to Fengchi to a mandatory respondent in the investigation that ceased to cooperate and withheld information.

Department Position:
We disagree with Fengchi and Fedmet that the Department has determined an inappropriate AFA rate for Fengchi and that the Department has failed to corroborate that 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 other information placed on the record. In reviews, the Department computes the total AFA rate for non-cooperating companies generally using program-specific rates calculated for the cooperating respondents in the instant review or in prior segments of the instant case, or calculated in prior CVD cases

involving the country under review (in this case, the PRC), unless it is clear that the industry in which the respondents operate cannot use the program for which these rates were calculated.[58] The Department's practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[59] 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."[60]

Consistent with the statute, court precedent, and our practice, the Department continues to find that the rate of 262.80 percent is the most appropriate rate for Fengchi as AFA for the final results. The rates for the various subsidy programs on which we are relying were calculated in recent CVD final investigations or final results of review for fully cooperating companies.[61] Therefore, these rates reflect the actual subsidy practices of the PRC's national, provincial, and local governments. Further, the calculated rates were based upon information about the same or similar programs for periods close in time to the POR in the instant case.[62] Finally, no information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. Thus, the Department has calculated an appropriate rate for Fengchi.

Fengchi's argument that the subsidy rate assigned is punitive and not reflective of commercial reality because it is ten times higher than the rates assigned to RHI and all other companies in the investigation is without merit. As an initial matter, the Court of International Trade has rejected the argument that a high margin alone renders an AFA rate unreasonable, and instead has reasoned that the Department "is unfettered by absolute numerical limitations" when selecting an AFA rate.[63] Moreover, the fact that the history of the order contains lower calculated rates for other companies does not render the selected rate unreasonable. As the Court of International Trade recently stated: "the evidence of calculated rates from {another proceeding} is irrelevant so long as the selected AFA rate as a proxy is corroborated. See {section 776(c) of the Act}; {section 776(b)} (providing that Commerce has the discretion to '*select { } from among* the facts otherwise available'). The lower calculated dumping margins from other {proceedings}, therefore, do not invalidate Commerce's otherwise corroborated … AFA rate."[64] As discussed below, because the Department corroborated Fengchi's rate to the extent practicable, the selected rate for Fengchi is reasonable.

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[58] See, e.g., Kitchen Racks, and accompanying Issues and Decision Memorandum at "Non-Cooperative Companies" section; see also Aluminum Extrusions from the PRC Decision Memorandum at "Application of Adverse Inferences: Non-Cooperative Companies" section.
[59] See SAA at 870.
[60] Id.; see also Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 76910, 76912 (December 23, 2004); D&L Supply Co. v. United States, 113 F.3d 1220, 1223 (Fed. Cir. 1997).
[61] See Preliminary Results, and accompanying Preliminary Decision Memorandum at 8-9.
[62] Id.
[63] See Universal Polybag Co. v. United States, 577 F. Supp. 2d 1284, 1301 (CIT 2008); see also KYD, Inc. v. United States, 613 F. Supp. 2d 1371, 1381 (CIT 2009).
[64] PSC VSMPO-AVISMA Corp. v. United States, 2011 WL 4101097, at *4 (CIT Sept. 15, 2011) (emphasis added).

Moreover, as a factual matter, Fengchi erroneously asserts that RHI's rate is based on total AFA. To the contrary, RHI received partial AFA because the GOC failed to provide certain information.[65] Importantly, while the GOC failed to provide information related to the financial contribution and specificity prongs of the Department's subsidy calculations, as to the other prong – benefit – the Department used RHI's actual information submitted during the course of the investigation.[66] In recent proceedings, the Department has relied upon rates calculated using partial AFA for purposes of determining the total AFA rate,[67] and consistent with that practice we similarly have done so in the instant review. Notably, the Department assigned a total AFA rate to Fengchi that is comparable to the AFA rate assigned to a mandatory respondent in the investigation that ceased to cooperate and withheld information.[68]

Additionally, the Department has corroborated Fengchi's rate to the extent practicable. Unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.[69] Due to the lack of participation by Fengchi and the resulting lack of record information concerning its use of programs under review, the Department has corroborated the rates it selected to the extent practicable.

The Court of International Trade has recognized that, in circumstances similar to that faced by the Department in this review – i.e., where both mandatory respondents decline to cooperate in the proceeding, "when a respondent has deprived Commerce of the very information it needs to accurately corroborate an AFA rate, the law does not require that Commerce's methodology be perfect."[70] Indeed, the Court of International Trade has recognized that "the statutory language only requires Commerce to corroborate a selected rate 'to the extent practicable,' {section 776(c) of the Act}, thus taking into account the potential difficulties associated with a lack of record evidence."[71] Addressing circumstances similar to those faced by the Department in this review, the Court has stated that although the Department must do more than merely adopt the highest margin from a previous review, it retains the discretion to make an inference that is adverse to the respondent absent evidence to the contrary.[72] The Court previously indicated that the explanation offered by the Department in the instant review would satisfy the corroboration

[65] See Certain Magnesia Carbon Bricks From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 45472 (August 2, 2010) (Bricks Final Determination), and accompanying Issues and Decision Memorandum at 5.
[66] Id., and accompanying Issues and Decision Memorandum at 13.
[67] See, e.g., Bricks Final Determination, and accompanying Issues and Decision Memorandum at "Application of Adverse Inferences: Non-Cooperative Company" section; see also Galvanized Steel Wire From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 77 FR 17418 (March 26, 2012), and accompanying Issues and Decision Memorandum at "Non-Cooperative Companies" section
[68] See Bricks Final Determination, and accompanying Issues and Decision Memorandum at 10.
[69] See Sodium Nitrite From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 38981, 38983 (July 8, 2008).
[70] PSC VSMPO-AVISMA Corp., 2011 WL 4101097 at *3; see also Qingdao Taifa Grp. Co. v. United States, 2011 WL 2713876 (CIT July 12, 2011).
[71] PSC VSMPO-AVISMA Corp., 2011 WL 4101097 at *3.
[72] Id.

requirement under the very circumstances that the Department now faces.[73]

Comment 3: Corrections to the Department's Draft Customs Instructions

Petitioner

- The Department should ensure that all customs instructions reflect its findings in the final scope determination that MACBs are in fact subject merchandise. Specifically, the instructions should include a note that bricks identified using other nomenclature, such as "magnesia-alumina carbon bricks," are also subject to this instruction if they meet the scope definition of certain magnesia carbon bricks.

Fengchi and Fedmet

- The Department's scope ruling was limited to Fedmet's Bastion ® magnesia alumina carbon bricks and was not intended to address all bricks designated as MACBs, in particular because there is no apparent industry standard for defining an MACB. In the scope ruling, the Department rejected Petitioner's request to apply the ruling more broadly to other types of bricks, or even to apply it generally to all types of MACBs.

    - Because the Department already issued CBP instructions consistent with the scope ruling, Petitioner's request is superfluous.

Department Position:
We disagree with Petitioner. As noted by Fengchi and Fedmet, the Department previously has issued appropriate customs instructions to CBP regarding the magnesia alumina carbon bricks scope ruling following the final scope determination. Thus, we do not find it necessary to add Petitioner's proposed language to the CBP instructions that will be issued for these final results.

Comment 4: Petitioner's Untimely Withdrawal Request

Fengchi and Fedmet

- The Department should rescind the review for all exporters for which Petitioner untimely withdrew its request for review.
- Even though Petitioner filed its withdrawal request after the 90-day deadline, 19 CFR 351.213(d)(1) provides that the Secretary may extend the deadline for filing a rescission request if the Secretary decides that it is reasonable to do so.

[73] See Essar Steel Ltd. v. United States, 880 F. Supp. 2d 1327, 1331-32 (CIT 2012) (citing as example of sufficient explanation as to (1) how it corroborated an AFA rate or (2) why corroboration is not practicable the following statement by the Department in prior proceeding: "Unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.").

- There are cases where the Department has previously denied extensions of the 90-day withdrawal deadline where it had already devoted considerable time and resources to a review.[74] As none of the parties to this review have answered the Department's questionnaire, the Department has not invested any time in substantive analysis of the programs under review or comments by parties.

- It is reasonable for the Department to extend the 90-day deadline in this case because this review has not progressed very far procedurally. The Department's reasonableness standard has been well established through years of consistent practice.[75]

- Although the Department included new language in the Initiation Notice stating that, for reviews requested on the basis of anniversary months on or after August 2011, the Department does not intend to extend the 90-day deadline, the Department may, on a case-by-case basis, extend the 90-day deadline if the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request.[76] It is unclear what the Department means by "extraordinary circumstances" in the Initiation Notice; however, the new language indicates that it is a more stringent standard than a finding of "reasonableness" as applied in past cases.

- By changing the regulatory standard for granting an extension after the 90-day period from "reasonableness" to "extraordinary circumstances," the Department has in fact repealed and amended 19 CFR 351.213(d)(l), in violation of the Administrative Procedures Act (APA).

Petitioner

- Petitioner agrees that the Department has discretion to rescind the review and liquidate entries for which there is no outstanding review request. However, liquidation should occur only after it is confirmed that correct deposits were paid at the time of entry.

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[74] See Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 77 FR 39680 (July 5, 2012), and accompanying Issues and Decision Memorandum at Comment I; see also Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 FR 12651 (March 7, 2005), and accompanying Issues and Decisions Memorandum at Comment 15 (parties withdrew their request five months after the preliminary results and only a few days before the Department was to issue the final results and facts suggested possible abuse of the procedures).

[75] See, e.g., Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Notice of Rescission of Antidumping Duty Administrative Review, 76 FR 77480 (December 13, 2011) (Pipe and Tube from Taiwan) (90-day time limit extended where "the Department has not devoted significant time or resources to the review" and the only party to request a review was now requesting withdrawal); Welded Large Diameter Line Pipe From Japan: Notice of Rescission of Antidumping Duty Administrative Review, 75 FR 38989 (July 7, 2010) (Pipe from Japan); and Freshwater Crawfish Tail Meat from the People's Republic of China, 68 FR 29267, 29268 (May 21, 2004) (Crawfish from the PRC) (90-day time limit extended where the Department had not released supplemental questionnaires nor conducted verification).

[76] See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 76 FR 67133 (October 31, 2011) (Initiation Notice).

Department Position:
The Department's regulation states that it "will rescind an administrative review . . . , in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review" and that the Department "may extend this time limit if the Secretary decides that it is reasonable to do so."[77] In interpreting this regulation and in determining whether it is reasonable to extend the 90-day time period, the Department has stated in the Initiation Notice that it "does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request."[78] The Department stated further that it would consider supported requests on a case-by-case basis.[79]

Petitioner failed to timely withdraw its request for review. As noted above, the Department initiated the instant review on October 31, 2011.[80] On March 29, 2012, Petitioner submitted a request to withdraw its request of certain exporters.[81] In other words, Petitioner's request was submitted 148 days after the Initiation Notice and nearly 59 days after the deadline for submitting withdrawal requests. In its request for withdrawal, Petitioner argued that the Department did not issue its Respondent Selection Memorandum until February 21, 2012, while the 90-day deadline for withdrawal in the instant review was January 30, 2012. Petitioner also argued that it could not completely analyze the CBP data placed on the record in sufficient time to make its withdrawal request by the 90-day deadline. The Department released the CBP data we intended to use as a basis for our respondent selection on November 22, 2011, two months prior to the withdrawal deadline. That we selected the mandatory respondents after the withdrawal deadline would have no bearing on Petitioner's ability to examine CBP data before that date.

Petitioner argues that we have the discretion to rescind and liquidate, provided that it is confirmed that the correct deposits were paid on entries during the POR. Petitioner is correct that the Department has discretion to rescind a review; however, the Initiation Notice clearly stated that the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request.[82] It was, and continues to be, the Department's finding that the Petitioner failed to articulate the extraordinary circumstances for its late request, let alone provide any reason for the untimely nature of its request. Without further information as to the reasons for the lateness, the Department could not determine whether the circumstances were extraordinary such that they warranted extending the deadline. As a consequence, the Department properly rejected the untimely request.

Fengchi and Fedmet's suggestions that the Department may reject untimely requests only under

[77] See 19 CFR 351.213(d)(1).
[78] See, e.g., Initiation Notice.
[79] Id.
[80] Id.
[81] See Letter from Petitioner to the Department "Administrative Review of Countervailing Duty Orders on Certain Magnesia Carbon Bricks from the People's Republic of China (8/2/2010-12/31/2010): Withdrawal of Request for Review" (March 29, 2012).
[82] See Initiation Notice.

certain circumstances – i.e., if (1) the Department has expended considerable resources or (2) if doing so would amount to an abuse of the procedures – are without merit. The Federal Circuit recently has affirmed that the Department has broad discretion in establishing deadlines in its regulations: "{a}bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[83] In the Initiation Notice, the Department stated that it would consider whether, upon the facts of each case, extraordinary circumstances existed such that the Department should accept an untimely request.[84] The Department is not foreclosed from considering reasons other than those provided in past cases in deciding whether to accept untimely withdrawal requests, and for the Department to accept only those reasons previously provided would run counter to the regulation and our express statement in the Initiation Notice.

Moreover, the preamble to the Department's regulations considered and rejected the argument that the Department should accept untimely requests where "(1) the party that initially requested the review withdraws its request, and (2) no other party objects to the rescission within a reasonable period of time," reasoning that although the 90-day limitation "may be too rigid," and that the Department "must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review."[85] If the Department were to accept untimely withdrawal requests that are not accompanied by any explanation for the delay in filing, it would allow parties in future proceedings to similarly ignore the Department's explicit instructions and render the deadline meaningless.

Fengchi and Fedmet's reliance upon prior cases before the Department are unavailing. In each of those cases, the Department did not apply its current practice and provided no notice to the parties that it did not intend to extend the 90-day period absent extraordinary circumstances.[86] However, as noted above, in the instant review the Department provided all parties with such notice in the Initiation Notice, and Petitioner did not provide the requisite explanations for its untimely request. Importantly, Fengchi and Fedmet admit in their case brief that the Department applied a different practice in those cases.[87]

Moreover, Fengchi and Fedmet's claim that the Department violated the APA is also without merit. The Department did not change its regulation; rather, in publishing the Initiation Notice, the Department put interested parties on notice as to what circumstances it would consider sufficient to exercise its discretion in accepting withdrawal requests after 90 days. Petitioner failed to carry that burden.

Finally, we disagree with Fengchi and Fedmet that we interpreted 19 CFR 351.213(d)(1) and 19 CFR 351.225(l)(4) in such a manner that renders our decision-making "arbitrary." The language

[83] See PSC VSMPO-Avisma Corp. v. United States, 688 F.3d 751, 760 (Fed. Cir. 2012) (internal quotation marks omitted) (citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543–44 (1978)).
[84] See, e.g., Initiation Notice.
[85] See Antidumping Duties; Countervailing Duties; Final Rule.
[86] See Pipe and Tube from Taiwan; Pipe From Japan, 75 FR at 38990; and Crawfish from the PRC, 68 FR at 29268.
[87] See Fengchi and Fedmet Case Brief at 18.

of 19 CFR 351.213(d)(1) speaks to whether the regulations concern distinct procedures and address distinct questions that arise from the Department's administration of the antidumping and countervailing duty law. That the Department interprets similar terms in different regulations with distinct aims does not alone render the agency's interpretation arbitrary.[88]

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review in the Federal Register.

AGREE ✓ DISAGREE _____

Paul Piquado
Assistant Secretary
for Import Administration

9 April 2013
Date

[88] See, e.g., Salant Corp. v. United States, 86 F. Supp. 2d 1301, 1303 (CIT 2000) (explaining that *Chevron* deference extends to regulations, as well as statutes); id. at 1305 (explaining that the "literal meaning of terms" cannot be interpreted "in a vacuum" and that a provision must "be construed as a whole and full force and effect given to *all* language contained therein").