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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: Certain Magnesia Carbon Bricks from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2010-2011 Administrative Review

SUMMARY:

We have analyzed the comments submitted in the 2010-2011 administrative review of certain magnesia carbon bricks from the People's Republic of China ("PRC"). After reviewing the comments and information received on the *Preliminary Results*,[1] we made no change to the *Preliminary 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 for which we received comments on the *Preliminary Results*.

Comment 1 Adverse Facts Available for Fengchi's Failure to Report Sales of Magnesia Alumina Carbon Bricks
Comment 2 The Appropriate Weighted-Average Dumping Margin Assigned to Fengchi
Comment 3 Surrogate Values for Dumping Margin Calculations
Comment 4 Customs Instructions

BACKGROUND:

The period of review ("POR") is March 12, 2010, to August 31, 2011. On October 9, 2012, the Department of Commerce ("Department") published the *Preliminary Results*. In the *Preliminary Results*, we preliminarily determined that Fengchi Imp. and Exp. Co., Ltd. of Haicheng City and its affiliated producer, Fengchi Refractories Co., of Haicheng City (collectively "Fengchi") withheld information requested by the Department, failed to respond within the established

[1] *See Certain Magnesia Carbon Bricks From the People's Republic of China: Antidumping Duty Administrative Review; 2010-2011*, 77 FR 61394 (October 9, 2012) ("*Preliminary Results*") and accompanying Decision Memorandum.

deadlines and significantly impeded the proceeding by refusing to respond to the Department's request to report sales of all subject merchandise, including certain magnesia alumina carbon bricks ("MACBs") that were ruled to be within the scope of the *Order*.[2] As a result, we relied on adverse facts available ("AFA") for Fengchi. In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on our *Preliminary Results*. On October 31, 2012, Fengchi submitted surrogate value ("SV") information. Also on October 31, 2012, the Department tolled all administrative deadlines by two days.[3] On November 13, 2012, the Department received case briefs from Resco Products, Inc. ("Petitioner"), and from Fengchi and Fedmet Resources Corporation ("Fedmet"), an importer of subject merchandise. On November 19, 2012, the Department received rebuttal briefs from Petitioner, ANH Refractories Company ("ANH"), a domestic interested party, Fengchi and Fedmet. On January 25, 2013, the Department partially extended the deadline for the completion of the final results by 31 days to March 11, 2013.

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 ISSUES

Comment 1: Adverse Facts Available for Fengchi's Failure to Report Sales of Magnesia Alumina Carbon Bricks

Fengchi and Fedmet:

- The Department's regulations at 19 CFR 351.225(l)(4) provide that merchandise subject to a final scope determination will be included in an on-going administrative review only where that scope determination is issued within 90 days of the initiation of the review.

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[2] *See Certain Magnesia Carbon Bricks From Mexico and the People's Republic of China: Antidumping Duty Orders*, 75 FR 57257 (September 20, 2010) ("*Order*"). *See also* the Department's supplemental questionnaire, dated August 3, 2012, at Attachment 1("MACB final scope ruling").

[3] As explained in the memorandum from the Assistant Secretary for Import Administration, the Department has 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," dated October 31, 2012.

- The Department's interpretation of 19 CFR 351.225(l)(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 cooperate to the best of their ability in providing such 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. The Preamble issued with the publication of the regulation confirms that after 90 days, it is too late in the review process to collect the information, and the Department is to apply non-AFA.
- Petitioner is also erroneous in its interpretation that 19 CFR 351.225(l)(4) gives the Department authority to request information on sales of MACBs beyond the 90-day deadline. While the Department need not wait for the final results of a scope inquiry in order to request information on a product that is subject to a pending scope ruling request, it is not an exception to the 90-day limitation on including the results of scope rulings in reviews.
- 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 the final result of its scope inquiry before requiring Fengchi to undertake the burden of reporting sales of merchandise that might not be found to be within the scope of the orders.
- The U.S. Customs and Border Protection ("CBP") data used by the Department to select the respondents was limited to entries of magnesia carbon 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 MACBs were not investigated by the Department during the original investigation, the Department's CONNUM hierarchy would have to be modified in order to take into account the unique physical characteristics of MACBs, including alumina content, spinel formation, *etc*. The Department would also have needed to provide all parties an opportunity to comment on the modification to the CONNUM hierarchy and would then have had to issue a new section C questionnaire incorporating the amended CONNUM hierarchy before Fengchi could begin to report its U.S. sales.
- By the time the Department determined to require Fengchi to report sales of MACBs, Fengchi had already submitted its questionnaire response and several extensive supplemental questionnaire responses, including its U.S. sales and the factors of production used to produce the merchandise sold during the POR. In addition, all parties had submitted comments on the appropriate surrogate country and SV data to be used to value Fengchi's factors of production. All of this work would have been rendered moot by the Department's demand that sales of MACBs be incorporated into the current 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 straight forward and not overly burdensome to Fengchi.

ANH:
- With respect to the Department's authority to request information, 19 CFR 351.301 expressly stated that the Department "may request any person to submit factual information at any time during a proceeding."
- The regulation that Fengchi cites at 19 CFR 351.225(l)(4) allows the Department to use neutral facts available for 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.
- The Department's request for MACB data was directly relevant to the review in determining the extent of dumping for the POR. The MACB sales information also indicates that Fengchi's single reported sale to be non-*bona fide* in nature.
- Fengchi's arguments that the Department's request required the review to essentially start over are without merit. 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's 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."

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 dumping margin for each entry of subject merchandise.[4] 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 issues within 90 days of initiation of the review, the Department will include sales of the product in question in its margin calculation, as long as it is practicable.

[4] *See* Section 751(a)(2) of the Act.

Accordingly, the Department will determine, in those cases, whether collecting that information is practicable. If more than 90 days have lapsed, the Department does not disregard those sales for purposes of the ongoing review. Instead, it may choose not to collect that sales information and rely instead on non-AFA as the basis for determining the margin of dumping, even if collecting that information would still be practicable. Alternatively, it may seek information about those sales as the Department did in this case. In short, before 90 days, the Department must collect sales information unless it is not practicable, and after 90 days, the Department may choose to use non-AFA, even if information collection is still practicable, or the Department may choose to include the sales in its margin calculation. 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 weighted-average dumping margin. The regulation also provides no basis for a respondent to claim that the Department is limited to the application of non-AFA whenever a final scope ruling is made 90 days after the initiation of the administrative review. Once the Department determines that there is sufficient time remaining in the review and requests the information, the second part of 19 CFR 351.225(l)(4) is no longer applicable with respect to non-AFA.

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."[5] 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."[6] 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 preliminary results, 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 and well after the expiration of 90 days. Therefore, we could not implement the proposal in a manner that would allow the Department to request and receive the needed additional

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5 *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27330 (May 19, 1997) (emphasis added).

6 *See id*.

information in a timely manner."[7] We recognize that the second part of this statement highlights questions of both practicability and fairness to affected respondent companies, particularly when, as in this case, the Department does not request the relevant sales information until after the preliminary determination has already been extended. However, we find that the facts of this case demonstrate that such information requests are not inherently impracticable or unreasonable, and 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 sales 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. 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 use actual sales information *or* 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, has impeded the Department's effort to develop the record as necessary to conduct this administrative review.

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 March 14, 2012, we sent the antidumping duty questionnaire to Fengchi requesting that it report information for all subject merchandise. On March 30, 2012, the Department issued a preliminary scope ruling that MACBs are within the scope of the *Order*.[8] On April 18, 2012, ANH submitted comments that all MACBs fitting the description of the scope should be included in the instant administrative review.[9] On April 23, 2012, Fengchi responded that the preliminary scope ruling was not final and Fengchi should not be burdened by such a request.[10] Subsequent to the

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[7] *See id. See also, e.g.*, the 120-day extension of the preliminary results in this review, issued three weeks prior to the original due date. *Certain Magnesia Carbon Bricks From the People's Republic of China: Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review*, 77 FR 27428 (May 10, 2012).

[8] *See* Department's memorandum, re: "Certain Magnesia Carbon Bricks From the People's Republic of China and Mexico: Preliminary Scope Ruling - Fedmet Resources Corporation," dated March 30, 2012.

[9] *See* ANH's April 18, 2012 submission.

[10] *See* Fengchi's April 23, 2012 response.

Department's preliminary scope ruling, on April 27, 2012, Fengchi submitted its original questionnaire response reporting only a single sale of subject merchandise and made no mention of information regarding its MACB sales to the Department.[11] These circumstances indicate that Fengchi was on notice that the MACB sales during the POR could be subject to the administrative review early in the review.[12] On July 2, 2012, the Department issued a final scope ruling that certain MACBs are within the scope of the *Order*.[13] By the time the Department issued a supplemental questionnaire requesting that Fengchi confirm whether it had reported all sales of subject merchandise, including MACBs, on August 3, 2012, Fengchi had ample warning and was well aware of the issue.[14] Furthermore, although Fengchi responded to the full antidumping duty questionnaire in 44 days, the Department extended the deadline for providing the additional sales information several times to September 17, 2012, giving Fengchi a total of 45 days to provide information about its MACB sales. The Department also indicated that we were willing to work with Fengchi to accommodate any additional time that Fengchi believed was needed to comply with the Department's request.[15] Instead of requesting additional time to provide the requested information, Fengchi repeatedly indicated its refusal to comply with the Department's requests.[16] Accordingly, the Department finds that Fengchi had sufficient time to review its records and all of its entries of subject merchandise, including MACBs, made 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, as it must complete the review on time, based on the information available at that time.[17] As noted below in Comment 4, and by Fengchi itself, the impact of the Department's MACB scope ruling is limited to certain MACBs that were reviewed by the Department, and there is no record evidence that a new respondent selection would alter the results in any way. Similarly, with respect to surrogate country selection, MACBs are magnesia carbon bricks, *i.e.*, subject merchandise, and we find no merit that incorporating the review of MACBs required a new surrogate country selection process. We note that our scope rulings clarify, but may not expand, the definition of an order's scope.[18] Accordingly, there is no reason that the list of economically comparable countries that are significant producers of

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[11] *See* Fengchi's Section C and D questionnaire response, dated April 27, 2012.

[12] *See* 19 CFR 351.225(l)(2), if liquidation has not been suspended, the Department will instruct CBP to suspend liquidation once an affirmative preliminary scope ruling is issued; in this case the preliminary ruling issued on March 30, 2012.

[13] *See* MACB final scope ruling.

[14] *See* Department's letter, re "First Antidumping Administrative Review of Certain Magnesia Carbon Bricks from the People's Republic of China: Sections C and D Supplemental Questionnaire", dated August 3, 2012 ("MACB supplemental questionnaire")

[15] *See* Department's memorandum to file, re "First Administrative Review of Magnesia Carbon Bricks from the People's Republic of China: Telephone Conversation with Counsel for Fengchi", dated October 1, 2012.

[16] *See* Fengchi's August 9, 2012, August 14, 2012, and August 29, 2012 objection letters.

[17] 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.

[18] *See E. Jordan Iron Works, Inc. v. United States*, 556 F. Supp. 2d 1355, 1358 (CIT 2008) ("While Commerce enjoys substantial freedom in conducting scope inquiries, the agency's role is to clarify the scope of the order; not to expand or modify it." (internal citations omitted).

magnesia carbon bricks would change to account for MACB production. Finally, because MACBs are simply magnesia carbon bricks with a specific range of alumina content, we find our current CONNUM hierarchy can properly account for MACBs.

Fengchi correctly notes that it has taken extensive efforts to provide responses to the Department's other supplemental questionnaires issued in July to August 2012. Among the responses, Fengchi reported in its first supplemental questionnaire response the total quantity (by weight) and value of all sales to its U.S. importer, which would have included its subject MACB sales.[19] In addition, Fengchi was able to distinguish what Fengchi considers as magnesia carbon bricks sales from other sales including MACBs, in its sales reconciliation. Specifically, Fengchi explained in its second supplemental questionnaire response that the magnesia carbon brick sales reported in its initial sales reconciliation included magnesia carbon bricks, MACBs and alumina magnesia carbon bricks, but later submitted a revised figure in its updated sales reconciliation for magnesia carbon bricks sales exclusive of MACBs.[20] Accordingly, we find that Fengchi has demonstrated that it possesses the information requested by the Department and was able to report them. However, Fengchi apparently determined it was not in its interest to report them, chose to withhold that information, and made no indication of any attempt to comply with the Department's request for information.

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, we continue to find that 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 sales information for Fengchi's MACB sales. 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 a weighted-average dumping margin 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.[21] Therefore, when selecting from among the facts otherwise

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19 *See* Fengchi's supplemental questionnaire response dated August 20, 2012, at 13.

20 *See* Fengchi's supplemental questionnaire response dated August 31, 2012, at 3.

21 *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), and *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103-316, vol. 1, at 870 (1994) ("SAA").

available, the Department has determined that an adverse inference is warranted with respect to Fengchi under section 776(b) of the Act.

Comment 2: The Appropriate Weighted-Average Dumping Margin Assigned to Fengchi

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 Court of Appeals for the Federal Circuit ("Federal Circuit") 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."[22]
- In addition, the Court of International Trade ("CIT") 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."[23]
- The 236 percent rate applied to Fengchi in the *Preliminary Results* by the Department is unreasonable, overly punitive, not reflective of Fengchi's commercial reality, and should be reduced in the final results.
- The Department should calculate a dumping margin for Fengchi's reported magnesia carbon bricks sales. This dumping margin should be weight-averaged with whatever AFA rate the Department applies to Fengchi's MACB sales. The dumping margin for the single sale also provides an actual dumping margin against which to measure the commercial reasonableness of the AFA rate selected for Fengchi's sales of MACBs.

Petitioner:

- In the underlying investigation, the Department's final determination assigned a rate of 236.00 percent to the PRC-wide entity, including uncooperative respondents, based on the petition. It is reasonable to infer from Fengchi's actions that its true dumping margin would have been comparable to the petition rate, if not higher.

ANH:

- When Fengchi withheld information and significantly impeded the review, the Department properly relied on information from the petition and the final determination of the investigation to assign Fengchi an AFA rate.
- In arguing that the AFA rate assigned to Fengchi is punitive, Fengchi's reliance on its single reported U.S. sale is misplaced as this sale is not a *bona fide* transaction.

Department's Position: As explained in the *Preliminary Results*, 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

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[22] *See Gallant Ocean (Thail.) Co., Ltd. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (quoting *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)) ("*Gallant Ocean*").
[23] *See Lifestyle Enterprise, Inc. v. United States,* Slip Op. 12-116, page 7 (CIT 2012) ("*Lifestyle Enterprise*").

previous review or determination; or (4) any information placed on the record. In reviews, the Department normally selects as AFA the highest rate determined for any respondent in any segment of the proceeding.[24] The CIT and the Federal Circuit have upheld the Department's practice.[25] 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."[26] 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."[27] In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's commercial activity, selecting the highest prior margin reflects a "common sense inference that the highest prior margin is the most probative evidence of current rates because, if it were not so, the importer, knowing the rule, would have produced current information showing the respondent's rate to be less."[28]

Consistent with the statute, court precedent, and its normal practice, the Department continues to find the petition rate of 236.00 percent as the most appropriate rate for Fengchi as AFA for the final results. As explained in the *Preliminary Results*, the Department finds this rate to be reliable and relevant, because it (1) was applied as the PRC-wide entity rate in the investigation,[29] (2) was corroborated in a prior segment using model-specific dumping margins of the cooperating respondent in that investigation,[30] and (3) was corroborated in this review using Fengchi's price and cost information obtained by the Department.[31] We also find the 236.00 percent petition rate to be a reasonably accurate estimate of Fengchi's weighted-average dumping margin for the POR. Through the Department's own efforts, we have discovered that instead of the single sale of subject merchandise Fengchi reported, Fengchi in fact sold a substantial quantity of subject merchandise based on information the Department obtained from CBP.[32] Moreover, sample sales documentation obtained from CBP by the Department

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[24] *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 68 FR 19504, 19508 (April 21, 2003).

[25] *See KYD, Inc. v. United States*, 607 F.3d 760, 766-67 (Fed. Cir. 2010) ("*KYD*"); *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 percent total AFA rate, the highest available dumping margin from a different respondent in a less-than-fair-value investigation); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 684 (2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd. v. United States*, 360 F. Supp. 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

[26] *See SAA* at 870.

[27] *See 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), and *D&L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997).

[28] *See KYD*, 607 F.3d at 766 (citing *Rhone Poulenc*, 899 F.2d at 1190).

[29] *See Certain Magnesia Carbon Bricks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 75 FR 45468, 45471 (August 2, 2010).

[30] *See id*., 75 FR at 45470.

[31] *See Preliminary Results* and accompanying Decision Memorandum at 10-11.

[32] *See* MACB supplemental questionnaire, at exhibit 2.

confirmed that these unreported sales were MACB sales sold by Fengchi at prices significantly lower than its single reported sale.[33] This evidence suggests that Fengchi's weighted-average dumping margin could have been even higher than the 236.00 percent AFA rate if it had provided the complete information requested by the Department. While Fengchi argues that the 236.00 percent AFA rate is punitive and does not reflect commercial reality, we disagree and find that the commercial reasonableness of this rate assigned to Fengchi could not be based on the minuscule data that Fengchi selectively reported, ignoring the substantial evidence of potential dumping uncovered by the Department.[34] Finally, we note that Fengchi currently has a cash deposit rate of 128.10 percent based on the investigation phase of this proceeding,[35] and we find that the rate of 236.00 percent for use as AFA is appropriate for Fengchi because it is sufficient to ensure that Fengchi does not benefit from failing to cooperate in our review by refusing to respond to the Department's request for complete information regarding its sales of subject merchandise.

Comment 3: Surrogate Values for Dumping Margin Calculations

Fengchi and Fedmet:

- In the instances where the SVs proposed by Petitioner and ANH differ from Fengchi's proposed SVs, *i.e.* for fused magnesia, alumina powder, stretch film, paper corners, coal, and inland freight, the Department should use Fengchi's recommended SVs to calculate final antidumping margin.

Petitioner:

- The Department cannot use SVs to calculate a dumping margin for Fengchi because Fengchi has not provided factors of production and prices for all of its subject sales.
- If the Department incorporates any SV information, it should not rely on Fengchi's recommended SVs for fused magnesia, alumina power, packing materials and coal.
- The Department should reject Fengchi's argument on alumina powder, because Fengchi made an assertion that should be considered as new factual information and referred to a SV memorandum from the investigation that is not on the record of this review.

Department's Position: With regard to Petitioner's comment that Fengchi's argument on alumina powder contains new factual information, we have not rejected that argument and removed it from the record because we find that it is merely an assertion without factual support from the record of this proceeding.

For these final results, consistent with Comments 1 and 2 above, the Department has determined to rely on total AFA to determine Fengchi's weighted-average dumping margin. As we are not relying on SVs to calculate Fengchi's weighted-average dumping margin, we will not separately address the selections of SVs.

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[33] *See* Department's memorandum, "First Administrative Review of Magnesia Carbon Bricks from the People's Republic of China: Corroboration Memorandum," dated October 1, 2012, at exhibit 1.

[34] *See Lifestyle Enterprise*, Slip Op. 12-116, page 7.

[35] *See Certain Magnesia Carbon Bricks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 75 FR at 45471.

Comment 4: Customs Instructions

Petitioner:

- The Department should include additional language in the customs instructions for the final results to reflect its findings in the final scope determination that MACBs are in fact magnesia carbon bricks.

Fengchi and Fedmet:

- The Department already sent instructions to CBP implementing the MACB scope ruling following its final scope determination.
- 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. Petitioner's proposed language would expand the reach of the scope ruling to cover other products not specifically examined by the Department.

Department's Position: The Department has previously issued appropriate customs instructions to CBP regarding the MACBs scope ruling following the final scope determination, thus we do not find it necessary to add Petitioner's proposed language to the CBP instructions for these final results.

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 and the weighted-average dumping margins in the *Federal Register*.

AGREE ✓ DISAGREE ______

______
Paul Piquado
Assistant Secretary
for Import Administration

9 APRIL 2013
Date