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International Trade Administration
Washington, D.C. 20230

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3rd Administrative Review
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April 7, 2015

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Certain Magnesia Carbon Bricks from the People's Republic of China; 2012-2013

I. Summary

We analyzed the comments of the interested parties in the third administrative review of the antidumping duty ("AD") order of certain magnesia carbon bricks ("bricks") from the People's Republic of China ("PRC"). Following the *Preliminary Results*[1], based upon our analysis of the comments received, 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 memorandum.

II. Background

On October 9, 2014, the Department published the *Preliminary Results*. On November 10, 2014, the Department received a case brief from Resco Products, Inc. ("Petitioner") and Magnesita Refractories Company ("Magnesita"), a domestic interested party.

III. 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

[1] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2012-2013*, 79 FR 61052 (October 9, 2014) ("*Preliminary Results*"), and accompanying Decision Memorandum.

weight as various metals, metal alloys, and metal carbides). Certain magnesia carbon bricks that are the subject of these orders are currently classifiable under subheadings 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.

IV. Discussion of the Issues

Comment 1: Whether the Department Should Limit U.S. Customs and Border Protection ("CBP") Data Query to Suspended AD/CVD Entries

Petitioner's and Magnesita's Arguments

- While data from CBP showed that there were no suspended AD and countervailing duty ("CVD") entries for any company during the POR, information provided by Petitioner and Magnesita indicates that subject bricks from the PRC had been sold in the United States during the POR.
- The Department should have requested CBP data not only on suspended AD/CVD (*i.e.*, type 3) entries, but also on normal consumption (*i.e.*, type 1) entries, and entries of other HTS categories outside the scope to determine whether there was fraudulent mislabeling or misclassification of entries by importers and sellers of bricks.
- While the Department explained its policy in the *08-09 PRC Shrimp Remand*[2] to not review import data regarding normal consumption entries due to the considerable resources required and the lack of effectiveness in reviewing such data, nonetheless, the Department should be a more active participant in enforcement.

Department's Position: Contrary to Petitioner's and Magnesita's implications, the Department takes extremely seriously its responsibilities as the administering authority of the AD/CVD statutes. Section 777A(c)(1) of the Tariff Act of 1930, as amended ("Act"), directs the Department to calculate individual weighted-average dumping margins for each known exporter and producer of the subject merchandise; but also gives the Department discretion, when faced with a large number of exporters and producers, to limit its examination to a reasonable number of such companies, if it is not practicable to examine all companies. On November 8, 2013, the Department published a notice of initiation of this administrative review covering 162 companies.[3] The Department announced in the *Initiation Notice* that the Department intended to select the largest exporters by volume for individual examination using data obtained from CBP.[4] When using CBP data, the Department obtains from CBP a listing of all entries during the POR made in each of the HTS categories referenced in the scope of the order that are designated as suspended AD/CVD entries. Such data are limited to subject merchandise that has been suspended for final determination of liability for AD and/or countervailing duties. It is the Department's longstanding practice to not conduct reviews for companies that do not have suspended AD/CVD entries because there are no entries for which the Department can issue

[2] *See Ad Hoc Shrimp Trade Action Committee v. United States*, Court No. 10-00275, Slip Op. 11-106 (CIT August 24, 2011); available at: http://enforcement.trade.gov/remands/11-106.pdf ("08-09 PRC Shrimp Remand").
[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 FR 67104 (November 8, 2013) ("*Initiation Notice*").
[4] *Id*.

assessment instructions.[5] On November 21, 2013, the Department released the results of the CBP query to interested parties. The query results showed no suspended entries of subject merchandise during the POR.[6] Subsequent to the Department's CBP data release, Petitioner and Magnesita submitted certain information and commented several times claiming that Petitioner and Magnesita have seen that PRC-origin subject merchandise was in the market during the POR at certain steel plants, and that importers and sellers entered subject bricks during the POR through fraudulent mislabeling or misclassification of entries.

With respect to Petitioner's and Magnesita's allegation that the CBP data which the Department obtained is unreliable due to mislabeling and misclassification, the Department disagrees. Petitioner and Magnesita have not provided a detailed explanation as to how the information they presented establish their mislabeling and misclassification claims. The Department, after examining the information and comments provided by Petitioner and Magnesita, cannot conclude based on the record evidence that there were entries of subject merchandise which had been mislabeled or misclassified and entered the United States during the POR as non-subject merchandise. Specifically, while Petitioner and Magnesita alleged that subject merchandise was entered and sold in the U.S. market during the POR, the Department cannot ascertain the nature of the merchandise that Petitioner and Magnesita observed at the steel plant in question based on the information presented, or the timing of sale and entry of the merchandise in question.

Additionally, the CBP data which the Department used for respondent selection are not the only measure which the Department relied upon to determine a particular respondent's actual quantity of subject merchandise shipped and/or entered during the POR. In fact, the Department requires exporters who had no shipments during the POR to file no-shipment certifications, and does not simply rely on the absence of entries in the CBP data before determining whether that party has any entries subject to review. In this segment, Fengchi Imp. and Exp. Co., Ltd. of Haicheng City and Fengchi Refractories Co., of Haicheng City (together, "Fengchi") submitted a timely filed certification that it had no shipments of subject merchandise to the United States during the POR.[7] Moreover, after an inquiry to CBP requesting information concerning Fengchi's no shipment claim, we did not receive information from CBP that contradicted Fengchi's claim of no shipments during the POR.[8] Therefore, the Department determined that Fengchi had no shipments of subject merchandise during the POR. Pursuant to the *NME Reseller Policy*, when the Department makes a determination that a company under review had no shipments during the POR, any suspended entries that entered under that company's case number, and which was subject to that company's cash deposit requirements, will be liquidated at the rate for the PRC-Wide Entity.[9] Accordingly, as the Department finds that there were no shipments for Fengchi

[5] *See, e.g., Certain Tissue Paper Products from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 18497 (April 4, 2008), *unchanged in Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 73 FR 58113 (October 6, 2008) (rescinding the review of Guilin Qifeng after finding that its reported sales were liquidated as not subject to antidumping duties and notifying CBP of potentially misclassified entries).

[6] *See* the Department's memorandum to file, dated November 21, 2013.

[7] *See* Fengchi's letter dated January 2, 2014.

[8] *See* Department's Memo to the File, Dated March 24, 2015.

[9] *See* Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 FR 65694 (October 24, 2011) ("*NME Reseller Policy*")

for the final results based on the information available to the Department, we will instruct CBP to liquidate any existing suspended AD/CVD entries of subject merchandise entered under the case number for Fengchi at the rate for the PRC-wide entity.[10]

While Petitioner and Magnesita argued repeatedly that the Department must expand the scope of this review to include normal consumption entries, and entries of other HTS categories not included in the scope of the order, the Department disagrees. Misclassification and mislabeling issues are of significant concern to the Department. Yet Petitioner and Magnesita provided no guidance as to what other HTS categories not included in the scope order which the Department should investigate. With respect to normal consumption entries versus suspended AD/CVD entries, as Petitioner and Magnesita recognized, and the Department explained in the *08-09 PRC Shrimp Remand*, data regarding normal consumption entries would not provide a more reliable or accurate means by which to determine the volume of subject merchandise during the POR than the data regarding suspended AD/CVD entries. The classification of whether a particular entry of merchandise is subject to an AD order is recorded on CBP 7501 forms by the importer of record. The CBP 7501 form does not require a detailed description of the merchandise entering, but rather requires only: 1) the HTSUS subheading and the title associated with that HTSUS subheading; and 2) the box containing the entry type (a number such as 01, 02, 03, *etc*.). Without extensive further inquiry in terms of information gathering and potential testing for each entry, the Department would be unable to determine whether imported merchandise has been misclassified or mislabeled. Other than arguing that the Department should be more active to investigate fraud, Petitioner and Magnesita provided no new information to address the limitations of data regarding normal consumption entries which the Department previously noted, or further guidance in the use of data regarding normal consumption entries to detect potential fraud. The Department continues to find that the reliance on data regarding suspended AD/CVD entries is appropriate in this review.

Comment 2: Whether the Department Should Issue Q&V Questionnaires to All Companies Under Review

Petitioner's and Magnesita's Arguments

- In light of evidence that the CBP data were incorrect, the Department should have issued Q&V questionnaires to the companies under review.
- While the Department argued in the *08-09 PRC Shrimp Remand* that issuing Q&V questionnaires is burdensome and unlikely to provide different information than the CBP data, it is not the case in this review as the Department would only need to issue questionnaires to three companies and electronic means of communications would not render the task burdensome.

Department's Position: While the Department has issued Q&V questionnaires in the past in administrative reviews, consistent with the discretion afforded by the statute, the Department's current practice is to use data regarding suspended AD/CVD entries to select respondents.[11] The statute is silent as to the appropriate method to use in gathering data for respondent selection, and

[10] *Id*.
[11] *See Initiation Notice*, 78 FR at 67104.

the Court of International Trade ("CIT") has upheld the Department's discretion in this regard.[12] As explained above and consistent with our practice, the Department properly relied upon CBP data regarding suspended AD/CVD entries in this review. The Department acknowledges certain exceptions to this practice, *e.g.*, the Department may consider Q&V data when CBP data have inconsistent units of measure. For example, in wooden bedroom furniture from the PRC, the Department was unable to examine the volume of subject entries because the units used to measure import quantities were not consistent for the three HTS categories identified in the scope of the order.[13] However, Petitioner and Magnesita were quite clear in their request and arguments that the Q&V questionnaires were not to resolve any data issue arising in the normal course of review, but to search for fraudulent misclassification and mislabeling of subject merchandise by unscrupulous exporters or importers attempting the evade the order.[14] As explained below, the Department finds such an inquiry to be within the purview of the CBP.

Additionally, the Department continues to find that issuing Q&V questionnaires in a review such as this would impose significant burdens on the parties and the Department. As an initial matter, as explained in the accompanying *Federal Register* notice, the Department is conducting this review with respect to over 150 companies.[15] Moreover, of the companies under review, only Fengchi is actively participating, and the Department does not have the necessary information to electronically deliver Q&V questionnaires to the other companies. To properly serve all of these companies with a Q&V questionnaire would require significant resources and time, to send and track the delivery of physical Q&V questionnaires and responses, to issue follow-up questionnaires when appropriate, and to aggregate and analyze the numerous responses.

Comment 3: Whether Identifying Misclassified Entries Falls Under the Department's Authority

Petitioner's and Magnesita's Arguments

- The Department should take a broader view of its enforcement obligations and consider its role in identifying fraud.
- In the instant review, the examples of fraud on the record were limited and could easily be investigated further on an *ad hoc* basis.

Department's Position: As the agency charged with administering the antidumping and countervailing duty laws, the Department has the inherent authority to protect the integrity of its proceedings. For example, the Court of Appeals for the Federal Circuit has recognized the Department's authority to ensure that our proceedings are not undermined by fraud.[16] Similarly,

[12] *See Pakfood Pub. Co., Ltd. v. United States*, 753 F. Supp. 2d 1334, 1345-46 (CIT 2011).
[13] The Department explained this exception in *Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 46565 (September 10, 2009) and accompany Issues and Decision Memorandum at Comment 8.
[14] *See* generally Petitioner and Magnesita's case brief, dated November 10, 2014.
[15] As noted in the *Initiation Notice*, the Department initiated this review covering 162 companies. *See Initiation Notice*, 78 FR 67106-67108. The Department rescinded the review with respect to two companies in the *Preliminary Results*, and for the final results, is further rescinding the review with respect to Fedmet Resources Corporation and finding that Fengchi Imp. and Exp. Co., Ltd. of Haicheng City made no shipments. Accordingly, 158 companies are under review as part of the PRC-wide entity.
[16] *See, e.g., Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-62 (Fed. Cir. 2008).

the law apportions responsibility for justice across the spectrum of administrative agencies, each according to its legislative mandate. For example, "it is Customs, not Commerce, that is charged with responsibility for enforcement of the laws prohibiting material false statements and omissions in customs entry documentation" under 19 U.S.C. § 1592.[17]

The Department agrees with Petitioner and Magnesita, in part, with respect to the Department's role in enforcing an antidumping duty order. Indeed, the Department has a specific set of regulations that direct our interpretation of the scope of the order, and the statute specifically directs the Department to investigate circumvention allegations. However, the Department disagrees with Petitioner's and Magnesita's contention that the Department's statutory mandate extends to the potential misclassification of entries as non-subject merchandise. The Department's scope and circumvention inquiries do not extend to the proper classification of entered merchandise, which is a responsibility of CBP. The Department understands, from the CIT's opinions in *Globe Metallurgical* and *Kinetic Industries*, that the broader responsibility for investigation and enforcement of the classification of merchandise between subject and non-subject merchandise lies primarily with CBP.[18] In *Globe Metallurgical*, the Court affirmed a decision by the Department not to conduct an administrative review of alleged transshipment because of the resources required to conduct such an investigation, and the possibility of a review in another type of proceeding. The Court acknowledged the Department's deferral of the investigation and enforcement of the mislabeling alleged in that situation (related to country of origin) to CBP: "Commerce's recognition of CBP's authority to investigate fraud, gross negligence, or negligence involving entries of merchandise, and that CBP is better positioned to address a standalone country-of-origin issue is also consistent with 19 U.S.C. § 1592."[19]

In *Kinetic Industries*, the Court affirmed the Department's decision not to initiate an administrative review based solely on allegations of the mislabeling of merchandise as not subject to an order. In that case, the petitioner requested an administrative review of the antidumping duty order on saccharin from the PRC for five Taiwanese companies, claiming that they were exporting PRC-produced saccharin to the United States and entering the merchandise as Taiwanese in an effort to avoid paying antidumping duties. The Department declined to initiate an administrative review based on these country-of-origin allegations on merchandise entered as non-subject merchandise. The CIT found that the Department's grounds for not employing administrative review procedures in these types of cases were reasonable and that the statute "expressly anticipates review of 'subject merchandise.'"[20]

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[17] *See Mid Continent Nail Corp. v. United States*, 949 F. Supp. 2d 1247, 1283 (CIT 2013)("As such, even assuming that violations such as those alleged by {petitioner} may have occurred, the investigation of any such potential violations would fall squarely within Customs' domain. Commerce here thus acted properly in referring to Customs the issue of whether certain companies may have acted negligently or fraudulently . . . .").

[18] *See Globe Metallurgical Inc., v. United States*, 722 F.Supp.2d 1372, 1381 (CIT 2010) ("*Globe Metallurgical*"); *Kinetic Industries Inc. v. United States*, 800 F. Supp. 2d 1339 (CIT 2011) ("*Kinetic Industries*").

[19] *See Globe Metallurgical*, 722 F.Supp.2d at 1381. The Court also stated that "Globe has not persuaded the court that Commerce, in addition to its statutory duty to calculate dumping margins for known entries of subject merchandise within an administrative review, must also, within the same administrative review, investigate an importer with no known entries of subject merchandise, that has certified it has no such entries (confirmed by CBP data), and that may be fraudulently evading an antidumping order by mislabeling entries of subject merchandise. Suffice it to say, Commerce's handling of Globe's transshipment allegation represents a permissible construction of the antidumping statute to which the court must defer." *Id*.

[20] *See Kinetic Industries*, 800 F. Supp. 2d at 1342.

To determine whether there is, in fact, widespread mislabeling or misclassification of merchandise as not subject to an order would take considerable time and resources, and is not the purpose of an antidumping duty administrative review. In fact, the statutory timeline for administrative reviews presents a significant barrier for investigating mislabeling or misclassification allegations. As stated above, the Department does have other procedures under its practice and the statute to investigate scope and circumvention claims, which provide more flexible timelines, but which Petitioner and Magnesita have not requested. Nevertheless, to address the concerns raised by Petitioner and Magnesita, consistent with normal practice, the Department provided CBP with the relevant information, as appropriate, to investigate and will continue to assist that agency in fulfilling its statutory mission relating to antidumping duty and countervailing duty collection and enforcement.

V. Conclusion

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

✓

Agree Disagree

Ronald K Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

April 7, 2015
(Date)